June 18. 79 Sub Mr Swayne

Ohio 1 183
Oct. 3. 1878

S TATES.

GE ADOLPH

FA EMS AND
L.

N ES FOR THE

Transcript
&
Record
1878

326

Supreme Court U States
9th Circ.

183 - 257

SUPREME COURT OF THE UNITED STATES.

No. 236.

GEORGE W. ATWOOD, ANNA M. ATWOOD, AND ADOLPH MAYER, PLAINTIFFS IN ERROR,

vs.

FANNY E. WEEMS, AS EXECUTRIX OF F. M. WEEMS AND IN HER OWN RIGHT, B. F. WEEMS, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

INDEX.

	Original.	Print
Writ of error	1	1
Assignment of errors	3	1
Citation	8	3
Declaration	10	3
Summons	25	7
Affidavit of J. J. Daniel	28	8
Petition for removal of case	37	11
Certiorari	41	12
Declaration	43	13
Plea of defendants	47	14
Answer	48	15
Jury	53	17
Verdict	57	19
Judgment	58	19
Bill of exceptions	60	20
Bond	121	38
Clerk's certificate	124	38

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the fifth judicial circuit, northern district of Florida, greeting:

Because in the records and proceedings, and also in the rendition of the judgement of a plea which is in the said circuit court before you, between Fanny E. Weems, as executrix of the last will and testament of Francis M. Weems and in her own right, Benjamin F. Weems, James M. Weems, W'm H. Weems, & Joseph H. Myers, plaintiffs, and George W. Atwood, Anna M. Atwood, his wife, and Adolf Mayer, defendants, a manifest error hath happened, to the great damage of the said George W. Atwood, Anna M. Atwood, his wife, and Adolf Mayer, as by
2 their complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday in October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 22 day of May, in the year of our Lord one thousand eight hundred and seventy-six, & the seal of this court.

[SEAL.] PHILIP WALTER, *Clerk.*

3 *Assignment of errors.*

Supreme Court of the United States, of October term, A. D. 1876.

GEORGE W. ATWOOD, ANNA M. ATWOOD, AND Adolph Mayer
vs.
FANNY E. WEEMS, JAMES M. WEEMS, William H. Weems, Benjamin F. Weems, and Joseph H. Myers. } In error.

Afterwards, to wit, on the second Monday of October, A. D. 1876, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said George W. Atwood, Anna M. Atwood, and Adolph Mayer, by H. Bisbee, j'r, their attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appear that the said circuit court decided that section eight hundred and 'wenty of the Revised Statutes of the United States was unconstitutional & void, and that there was no right of challenge to jurors
4 for the causes in said sections of the Revised Statutes of the United States mentioned.

SECOND ERROR.—There is error in this, that it appear from the record aforesaid that said circuit court instructed the jury that the legal title to the property in controversy in this case was, at the time the will (un-

der which defendants in error claimed title) was made, in Francis M. Weems, and that Francis M. Weems, though he was not in possession of the property when the will was made, and though the possession was held adversely to him at that time, could devise the property aforesaid and the right of entry to the devisees named in the will.

THIRD ERROR.—There is also error in this, that said circuit court instructed the jury that the title to premises in question in this suit passed by the will to the devisees named in the will, and that Francis M. Weems had the right of entry to the premises at the date of said will, and that the plaintiffs were entitled to recover in this action upon the case made by them.

5 FOURTH ERROR.—There is also error in this, to wit, that it appear from the record that the court instructed the jury orally that the notice of the tax-sale of the property in question, in order to be legal, must have been advertised twenty-eight days from the date of the first publication to the date of the last publication before the sale, and that if the jury found from the evidence that the notice of sale was first published on the 19th day of Nov., A. D. 1863, and that the fourth publication was on the 15th of December of said year, the court instructed the jury that such notice of sale was insufficient, and the sale was void and the certificate of sale a nullity. It further appears from the record that the instructions of the jury upon the subject of the sufficiency of the notice of sale as set forth in the third exception of the bill of exceptions were erroneous.

FIFTH ERROR.—There is also error in this, that it appears from the record that the court instructed the jury orally that if the com-

6 missioners adopted a rule, whether the same was in writing or not, that they would not receive the taxes from any one but the owner in person, or a person holding a lien upon the property, after the lapse of sixty days from the publication of the assessment, the necessity of a tender of taxes was dispensed with and the sale of the lot in question would be void. It further appears from the testimony as set forth in the fourth exception of the bill of exceptions that such instructions were not called for, and that the court did not instruct the jury whether or not the facts and evidence before the jury showed that the commission's did adopt such a rule, nor what acts of the commissioners amounted to the adoption of such a rule, and thus left to the jury the decision of a question of law.

SIXTH EXCEPTION. There is error in this, that it appear from the record that the tax commission's had an office at Fernandina, Florida, where the taxes could be paid, and that the court charged the

7 jury in effect that the owner of the property in question was not required by law, nor was it his duty, to pay or tender the taxes to the commission's at Fernandina, nor at any place other than S't Augustine, Florida. And the said George W. Atwood, Anna M. Atwood, and Adolph Mayer pray that the said judgment may be reversed, annulled, and held for nothing, and that they may be restored to all things which they have lost by the occasion of said judgment.

H. BISBEE, JR.,
Att'y for Plaintiffs in Error.

8 In the circuit court of the United States, northern district of Florida.

UNITED STATES OF AMERICA, *ss:*

To Fanny E. Weems, as executrix of the last will & testament of Francis M. Weems, and in her own right, Benjamin F. Weems, James M. Weems, & William H. Weems, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pur*pus*ant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Florida, wherein George W. Atwood and Anna M. Atwood are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 22nd day of May, A. D. in the year of our Lord one thousand eight hundred and seventy-six.

PHILIP FORBES,
A Judge at and of said Circuit Court.

9 (Indorsed:) In circuit court United States, northern district of Florida. Geo. W. Atwood et al., plaintiffs in error, vs. Fanny E. Weems et al., defendants in error. Citation. Filed May 22nd, 1876. P. Walter, clerk. H. Bisbee, j'r, att'y for plaintiffs in error.

Service accepted this 22nd day of May, A. D. 1876.
FLEMING & DANIEL,
Att'ys for Defendants in Error.

10 In the circuit court, 4th judicial circuit of Florida, S't Johns County.

FANNY E. WEEMS, AS EXECUTRIX OF THE LAST will and testament of Francis M. Weems, and in her own right, Benjamin F. Weems, James M. Weems, William H. Weems, and Joseph H. Myers, plaintiffs,
against
GEORGE W. ATWOOD, ANNA M. ATWOOD, HIS wife, and Adolph Mayer, defendants.

The plaintiffs, by their attorneys, Fleming & Daniels, and J. M. & J. H. Baker, complain and allege:

I. That on the 22nd day of May, 1860, one Francis M. Weems was lawfully possessed as the owner in fee simple of the following-described premises in said county, to wit, lot number in block number forty-six, in the city of S't Augustine, county of S't Johns and State
11 of Florida, bounded on the north by lot of C. Bravo, on the east by lot of C. F. Hopkins, on the south by Bridge street, and on the west by lot of M. Panjaud, Geo. Burt, and J. E. Peck.

II. That being so seized and possessed, the said Francis M. Weems, on the 22nd day of May, 1860, made and entered into a written obligation under seal, to and with the plaintiff, Joseph H. Myers, by which the said Francis M. Weems covenanted and agreed to make to the said

Myers a fee simple title to the premises aforesaid on the payment by the said Myers of the sum of two thousand dollars, as follows: five hundred dollars on the execution of said agreement, and the balance in three equal installments of five hundred dollars each, the first payable with interest from the date of said agreement, on or before the first day of October, 1862, the second with interest from the said date, on or before the first day of October, 1863, and the third and last instalment on or before the first day of October, 1864, with interest from said date, a copy of which agreement is attached to this complaint, marked A.

12 III. That in pursuance of the said agreement the said Myers, upon the execution of the same, paid five hundred dollars to the said Francis M. Weems, and was thereupon let into possession of the said premises.

IV. That afterwards, to wit, about the early part of A. D. 1862, the plaintiff, J. H. Myers, moved away from S't Augustine, Fla., leaving one Amos W. Corbett in charge of the said premises, who, as his agent, was authorized to pay all taxes and assessments which might accrue on the said property during the absence of the said Myers; that the intervention of the late civil war prevented the return of the plaintiff, Myers, to S't Augustine for several years.

V. That during the year 1863, the said Francis M. Weems was taken from S't Augustine, Fla., to Hilton Head, S. C., and imprisoned by the military forces of the United States, as hereinafter more specifically set up and alleged; that upon being thus forcibly removed from S't Augustine, and not yet having made a deed of conveyance to the said

13 Myers of the said premises, in consequence of the failure of plaintiff Myers to complete said payments, as above mentioned, he, the said F. M. Weems, appointed the said Amos W. Corbett his agent, and instructed him to pay any and all lawful taxes or assessments which had accrued or might accrue on the said premises, and the said F. M. Weems also requested one Cristobal Bravo and one Samuel Buflington to act as his agents during his compulsory absence from S't Augustine, and to protect his interests in the premises, and to pay any and all lawful taxes which might accrue or become due thereon.

VI. That during the summer of 1863, and while the said F. M. Weems was a prisoner at Hilton Head, and at sundry times afterwards, and before the tax sale hereinafter mentioned, the said Corbett, as agent of the said F. M. Weems, applied to David R. Dunham, who was at the time assessor of the United States direct tax commission, and offered to pay and tendered to the said Dunham the whole amount due for taxes on the said premises, which had accrued under the act of Congress approved the 5th day of August, 1861, entitled "An act to pro-

14 vide increased revenue from imports to pay interest on the public debt, and for other purposes;" that the said Dunham refused to receive the said taxes from any one but the said Francis M. Weems in person.

VII. That the said Cristoval Bravo, as agent of the said Francis M. Weems, during the month of August, 1863, also applied to the said David R. Dunham to pay said taxes due on the said premises under the act of Congress aforesaid, but the said Dunham refused to receive the said taxes thus tendered, saying that the same must be paid by the said Francis M. Weems in person and not by agent.

VIII. That also about the month of August, 1863, Samuel Blufington, as agent of the said Francis M. Weems, applied to the said David R. Dunham and offered to pay him the amount of the taxes due on said premises under said act of Congress, but the said Dunham refused to

receive the said taxes from any party but the said Francis M. Weems in person.

IX. That the United States tax commissioners for the State of
15 Florida, appointed to collect the direct tax, under the act of Congress approved June 7th, 1862, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," were absent from S't Augustine much of the time, while exercising the duties of their office, and the said David R. Dunham was authorized by them to act generally as their agent, at S't Augustine, Fla., in receipt of taxes under the acts of Congress aforesaid; that said Dunham, during the years 1863 and 1864, in pursuance of the authority aforesaid, did act as the agent of the said tax commissioners in the collection of the taxes levied under the said acts of Congress, and the said commissioners recognized and approved his acts as such agent.

X. That on or about the 21st day of December, 1863, notwithstanding the frequent and repeated tender of the amount of taxes due on the said premises by the agents of the said Francis M. Weems as aforesaid, the said tax commissioners proceeded to sell and did sell the said
16 premises for non-payment of taxes, and the same was purchased by the defendant Adolph Mayer.

XI. That the said sale is irregular, informal, fraudulent, and in violation of the laws of the United States and null and void, and conveyed no right, title, or interest in or to the said premises to the said purchaser, Mayer, or to any person or persons claiming by and through him.

XII. That the tax commissioners could not lawfully exercise the duties of their office in the county of S't Johns, the commanding general not having established the military authority of the United States throughout the county of S't Johns, the same being at that time an insurrectionary county, but that the Confederate forces at that time held control of and authority over almost the entire county, except the city of S't Augustine.

XIII. That the tax commissioners did not advertise the said premises according with law; that the paper in which the same was advertised was not a newspaper in the ordinary and legal acceptance of that
17 term, having subscribers and a circulation among the people of the county, but was brought to the city of S't Augustine for the purpose alone of printing advertisements of this character for tax-sales, and intended and used as a fraudulent evasion of the law in such case made and provided; that the sale of said lands was not advertised in any newspaper published in a town, parish, district, or county where the said land is situate, or in the city of Washington, as required by law.

XIV. That the sale of said lot of land and premises, under which said defendants pretend to claim, was made on the 21st day of December, 1863, and that a certificate of sale was afterwards made to the said defendants, Adolph Mayer, that said sale was made and certificate of sale issued by only two of said tax commissioners, to wit, L. D. Stickney and William Alsop; that said sale was made and certificate issued in violation of the act of Congress provided in such cases, which requires
18 that said sales for taxes shall be made by the board of three tax commissioners which had been appointed for that purpose, and therefore said sale and certificate were null and void.

XV. That under and by virtue of a military order made previous to the assessment of said taxes by said commissioners, the citizens of S't Augustine, male and female, were required to take a prescribed oath,

and on refusal to take such oath, they were either sent into the Confederate lines or taken off as prisoners and refused permission to return to their homes. That said tax commissioners, or part of them, aforesaid, fraudulently combining together, and with other persons unknown to plaintiffs, for the purpose of making the sale of the property of citizens thus driven from their homes more certain and at even nominal prices to themselves or their confederates, took advantage of such forced absence to assess the said direct tax, and to advertise and sell the same,

and that while the said Francis M. Weems, who held the legal
19 title to said land, was held as a prisoner of the Federal forces, at Hilton Head, by the military authorities of the United States as aforesaid, and prevented and deprived of the privileges of paying said tax in person, as well as by agent as aforesaid, the said commissioners advertised and sold the said lands and premises in manner aforesaid, which sale, being made as aforesaid, plaintiffs allege was illegal, fraudulent, and void.

XVI. Plaintiffs further allege that the defendant Anna M. Atwood, wife of George M. Atwood, with notice and free knowledge of the condition of the title to said land and the irregularity and illegality of said tax sale, purchased the said land and premises from the said Adolph Mayer, and under and by virtue of a deed of conveyance from him, claims the same as her property and unlawfully holds possession of the same to the great loss and damage of the plaintiffs of the rents

and profits which should properly come to them for the same,
20 to wit, the damage of five thousand dollars.

XVII. That on or about the day of October, 1865, Francis M. Weems died leaving a last will and testament, bearing date the 25th day of September, 1865, which was duly admitted to probate, in the city of Baltimore and State of Maryland, on the ninth day of November, A. D. one thousand eight hundred and sixty-five.

XVIII. That in and by said last will and testament the plaintiffs, Fanny E. Weems, Benjamin F. Weems, James M. Weems, and William H. Weems, are designated as sole devisees and legatees of all the property, real and personal, of the said Francis M. Weems.

XIX. That the plaintiff Fanny Elizabeth Weems under the provisions of the said last will and testament was made sole executrix thereof, with the entire management of the property therein named, and with

certain other *pareis* therein specifically set forth.

21 XX. That the contract for the conveyance of the premises hereinbefore named between the said Francis M. Weems and the plaintiff Joseph H. Myers is still unexecuted, the said Myers being ready and willing at any time when the legal representatives of the said Francis M. Weems are prepared to comply with their part of the contract, to pay the residue of the purchase-money therefor.

Whereupon the plaintiffs demand judgement.

1st. That the sale of the said described lot of land and premises made by the tax commissioners aforesaid, on the 21st day of December, 1863, the certificate of sale given by them to the defendant Adolph Mayer, and the subsequent sale and transfer made by said Mayer the defendant Anna M. Atwood be set aside and declared by judgement of this court to be null and void.

2nd. That the defendants be required by judgement of this
22 court to make restitution of possession of said described lands or lot of land and premises to the plaintiffs.

3d. That the plaintiffs be allowed the sum of five thousand dollars for

their damages for the unlawful detention of the said described premises and appurtenances from the plaintiffs.

FLEMING & DANIEL,
I. M. & H. J. BAKER,
Att'ys for Pl'ffs.

23 A.

Articles of agreement made and entered into on this twenty-second day of May, A. D. 1860, by Francis M. Weems and Joseph H. Myers.

It is and by said articles agreed and stipulated by the parties hereto as follows: The said Francis M. Weems agrees to sell his lot and premises and improvements of all kinds thereon, including trees, plants, &c., situated on Bridge street, by which it is bounded on the south; on the west by lot of Panjaud and part of lot lately owned by Louis Drysdale, deceased; on the north by lot of James M. Gould; and on the east by lot now owned by Charles Hopkins, for the sum of two thousand dollars, payable in cash, $500 down, on the execution of this agreement, and the balance in three equal instalments of $500 each, the first payable with interest from this date on or before the first day of October, 1862; the second with interest from this date on or before the 1st day of October, 1863; and the third and last instalment on or before
24 the 1st day of October, 1864, with interest from this date, and to have executed by himself and wife in due form of law of the State of Florida, and to deliver the same, transferring and conveying to said . Joseph H. Myers, in consideration of the premises, agrees to purchase the said property and pay therefor the said sum of two thousand dollars ($2,000) at the times and in the manner herein stated, with interest thereon as stipulated.

In witness whereof the parties to this agreement have hereunto affixed their names and seals the day and year first above written.

FRANCIS M. WEEMS. [SEAL.]
JOSEPH H. MYERS. [SEAL.]

Signed, sealed, & acknowledged in the presence of—
BENJ'M. A. PUTNAM.
GEORGE HOPKINS.

(Indorsed:) In the circuit court. 4th judicial circuit court, S't Johns County. Fanny E. Weems, Benjamin F. Weems, et al., vs. Anna M. Atwood & George W. Atwood & Adolph Mayer. Complaint. Filed Aug. 9, 1871. Chas. D. Lincoln, clerk, by Fatio Dunham, deputy clerk. Fleming & Daniel & I. M. & H. J. Baker, att'ys for pl'ff.

25 *Summons.*

Circuit court S't John's County, 4th judicial circuit, State of Florida.

FANNY E. WEEMS, BENJ. F. WEEMS, JAMES M. Weems, William H. Weems, and Joseph H. Myers, plaintiffs,
against
GEORGE W. ATWOOD, ANNA M. ATWOOD, and Adolph Mayer, defendants.

The State of Florida to Geo. W. Atwood, Anna M. Atwood, and Adolph Mayer, defendants:

You are hereby summoned to answer the complaint of Fanny E.

Weems, Benj. F. Weems, James M. Weems, William H. Weems, and Joseph H. Myers, plaintiffs, which was filed in the office of the clerk of this court, at S't Augustine, in said county, on the 9th day of August, 1871, and to serve a copy of your answer upon the undersigned at their office, corner of Bay and Ocean streets, Jacksonville, Flo-
26 rida, within thirty days after service hereof, exclusive of the day of service; and if you fail so to do, the plaintiff will apply to the court for the relief demanded in the complaint besides the costs of this action.

Dated at Jacksonville, Fl'a, August 7th, 1871.

FLEMING & DANIEL &
J. M. & H. J. BAKER,
Plaintiffs' Attorneys.

COUNTY OF S'T JOHN'S,
State of Florida, ss:

Antoine L. Ximanies, being duly sworn, says that on the tenth day of August, 1871, at twenty minutes to twelve o'clock m., he served the within summons on George W. Atwood and Anna M. Atwood, his wife, at their residence in the city of S't Augustine, county of S't John's and State of Florida, defendants therein named, by delivering to and leaving with them each personally a copy thereof, and that he knew the persons served to be the same persons mentioned and described
27 in the summons as defendants therein.

ANTONIO L. XIMANIES.

Sworn to before me this 10th day of August, A. D. 1871.

CHA'S D. LINCOLN,
Clerk Circuit Court S't John's County, Florida,
By FATIO DUNHAM,
Deputy Clerk.

(Indorsed:) Circuit court S't John's County, State of Florida. Fanny E. Weems, Benj. F. Weems, et al., plaintiffs, against George W. Atwood, Anna M. Atwood, & Adolph Mayer, defendants. Summons. Original filed August 10th, 1871. Cha's D. Lincoln, clerk, by Fatio Dunham, deputy clerk.

28 In the circuit court 4th judicial circuit of Florida, S't John's County.

FANNY E. WEEMS, AS EXECUTRIX OF THE last will and testament of Francis M. Weems, and in her own right; Benjamin F. Weems, James M. Weems, William Weems, and Joseph H. Myers,
vs.
GEORGE W. ATWOOD, ANNA M. ATWOOD, and Adolph Mayer.

STATE OF FLORIDA,
County, ss:

J. J. Daniel, of the firm of Fleming and Daniel, att'ys for plaintiffs, being duly sworn, says that a cause of action exists in favor of the plaintiffs above named against the defendants above named, the grounds of which are as follows:

The defendants, George W. Atwood and Anna M. Atwood, are in possession, claiming title under and through said defendant,
29 Adolph Mayer, of the following premises, to wit:

Lot number in block number forty-six in the city of S't Augustine, county of S't John's, and State of Florida, bounded on the north by lot of C. Bravo, on the east by lot of C. F. Hopkins, on the south by Bridge street, and on the west by lot of M. Pangaud, George Burt, and J. E. Peck, to which said premises the plaintiffs claim title.

That the defendant, Adolph Myer, is not a resident of this State; that defendant's residence is unknown, and cannot with reasonable diligence be ascertained, and that said defendant Mayer cannot after due diligence be found within this State; that the relief demanded consists wholly in excluding the defendant Adolph Mayer from any interest in or lien on the said premises.

J. J. DANIEL.

Sworn to before me this 7th day of August, A. D. 1871.
[NOTARIAL SEAL.] C. B. GRAYBILL,
Notary Public.

29½ (Indorsed:) Circuit court S't John's County, Florida. Fanny E. Weems, Benj. F. Weems, et al., vs. George W. Atwood, Anna M. Atwood, & Adolf Mayer. Affidavit for publication of summons. Filed Aug. 9, 1871. Cha's D. Lincoln, clerk, by Fatio Dunham, deputy clerk.

30 *Summons.*

Circuit court S't John's County, State of Florida.

FANNY E. WEEMS, BENJ. F. WEEMS, JAMES M. Weems, William H. Weems, and Joseph H. Myers, plaintiffs,
against
GEORGE W. ATWOOD, ANNA M. ATWOOD, and Adolf Mayer, defendants.

The State of Florida to George W. Atwood, Anna M. Atwood, and Adolf Mayer, defendants:

You are hereby summoned to answer the complaint of Fanny E. Weems, Benj. F. Weems, James M. Weems, and Joseph H. Myers, plaintiffs, which was filed in the office of the clerk of this court, at S't Augustine, in said county, on the day of August, 1871, and to serve a copy of your answer upon the undersigned, at their office corner of Bay and Ocean streets, Jacksonville, Florida, within thirty
31 days after service hereof, exclusive of the day of service; and, if you fail so to do, the plaintiff will apply to the court for the relief demanded in the complaint besides the costs of this action.

Dated Jacksonville, Fl'a, Aug. 7, 1871.

FLEMING & DANIEL &
J. M. & H. J. BAKER,
Plaintiffs' Attorneys.

In the circuit court 4th judicial circuit of Florida, S't J. hn's County.

FANNY E. WEEMS, AS ADMINISTRATRIX OF Francis M. Weems, and in her own right; Benj. F. Weems, James M. Weems, William H. Weems, and Joseph H. Myers,
vs.
GEORGE W. ATWOOD, ANNA M. ATWOOD, & Adolf Mayer.

32 It appearing to the satisfaction of this court, by the affidavit of J. J. Daniel on file in this cause, that the defendant Adolf Mayer cannot, after due diligence, be found; that his residence is unknown and cannot, with reasonable diligence, be found; that he is a proper party to this action, which relates to real property within this State; and that the reliefs demanded by the plaintiffs consists wholly in excluding the defendant Adolph Mayer from any interest in, or lien on, the premises described in the said affidavit:

Now, on motion of Fleming and Daniel & J. M. & H. J. Baker, plaintiffs' counsel, it is ordered that the summons herein, a copy of which is hereto annexed, be served by publication of the same in the S't Augustine Examiner, a newspaper published in S't Augustine, county of S't John's, State of Florida, once in each week for four successive weeks.

Jacksonville, Fl'a, Aug. 7, 1871.

THO'S T. LONG,
Judge.

(Indorsed:) Circuit court S't John's County, Florida. Fanny E Weems, Benj. F. Weems, et al., vs. George W. Atwood, Anna M. Atwood, & Adolf Mayer. Order for publication of summons. Filed Aug. 9, 1871. Cha's D. Lincoln, clerk, by Fatio Dunham, deputy clerk.

33 Circuit court county of S't John's, State of Florida.

FANNY E. WEEMS, AS ADMINISTRATRIX OF Francis M. Weems, and in her own right; Benjamin F. Weems, James M. Weems, William H. Weems, and Joseph H. Meyers, plaintiffs,
against
GEORGE W. ATWOOD, ANNA M. ATWOOD, AND Adolf Mayer, defendants.

Notice is hereby given to all whom it may concern that this action is brought against the defendants in the above-entitled action for the purpose of recovering possession the premises described in the complaint of the above-named plaintiffs and damages for the unlawful detention of the same, which premises are described in the complaint as follows, to wit:

Lot number in block number forty-six in the city of S't Augustine, county of S't John's, and State of Florida, bounded on the north by lot of C. Bravo, on the east by lot of C. F. Hopkins, on the south by
34 Bridge street, and on the west by lot of M. Panjaud, Geo. Burt, and J. E. Peck.

FLEMING & DANIEL &
J. M. & H. J. BAKER,
Attorneys for Plaintiff.

34½ (Indorsed:) Circuit court, county of S't John's, State of Florida. Fanny E. Weems, Benj. F. Weems, et al., plaintiffs, against Geo. W. Atwood, Anna M. Atwood, & Adolf Mayer, defendants. Notice of pendency of action. Filed Aug. 9, 1871. Cha's D. Lincoln, clerk, by Fatio Dunham, deputy clerk.

35 OFFICE OF THE CLERK OF THE CIRCUIT COURT,
S'T JOHN'S COUNTY, FLORIDA,
S't Augustine, Oct. 18th, 1871.

FANNY E. WEEMS, AS EXECUTRIX OF THE last will and testament of Francis M. Weems, and in her own right; Benjamin F. Weems, James F. Weems, William H. Weems, and Joseph H. Myers,
vs.
GEO. W. ATWOOD, ANNA M. ATWOOD, HIS wife, and Adolph Mayer.

I hereby certify that the foregoing is a true and correct transcript of the record and proceedings in the above-entitled cause as well as all papers on file in this office relating to all things touching the same.

In testimony whereof I hereunto set my hand and affix the
36 seal of said circuit court, at S't Augustine, this 18th day of October, A. D. 1871.

[SEAL.]

CHA'S D. LINCOLN,
Clerk of the Circuit Court S't John's County,
By FATIO DUNHAM,
Deputy Clerk.

36½ (Indorsed:) Fanny E. Weems et al. vs. George W. Atwood, Anna M. Atwood, his wife, and Adolf M'yer.

37 To the judges of the circuit court of the United States for the northern district of Florida.

FANNY E. WEEMS, AS EXECUTOR OF THE LAST will and testament of Francis M. Weems, and in *his* own right, Benjamin F. Weems, James M. Weems, William N. Weems, & Joseph N. Myers, plaintiffs,
vs.
GEORGE W. ATWOOD AND ANNA M. ATwood, his wife, and Adolph Mayer, defendants.

Your petitioner, the defendants in the above-entitled cause, respectfully show unto the honorable court that the plaintiffs in the said cause have ins'tuted in the circuit court of S't John's County, State of Florida, an action by summons, entitled as aforesaid, to set aside the defendants' title to, and recover the possession of, certain real estate, situated in the said county; that defendants claim title to, and possession of, said rea
estate, under and by virtue of a sale made thereof by the United
38 States direct tax commissioners for the State of Florida, under and by virtue of the authority rested in them by certain revenue laws of the United States, to wit, an act of Congress of the United States,

entitled "An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes," and approved August 5th, 1861, and an act of the said Congress entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," approved June 7th, 1862; that the said action and suit has been commenced on account of the said title to said real estate set up and claimed by defendants, under the said sale made under the acts of Congress aforesaid by the tax commissioners aforesaid, and thus defendants are citizens and residents of the said northern district of Florida, and the said plaintiffs are citizens & residents of the State of Maryland, except the plaintiff Myers, who is a citizen of the State of Vermont; wherefore your petitioners pray that said cause be removed by proper process to the circuit court of the United States for said district.

39 Geo. W. Atwood, Anna M. Atwood, and Adolph Meyers, Geo. W. Atwood, agent.

STATE OF FLORIDA,
Duval County:

Personally appeared before me, , George W. Atwood, one of the defendants to the suit specified in the foregoing petition, who, being sworn, says that the facts set forth are substantially true and correct.

GEO. W. ATWOOD.

Subscribed and sworn to before me this 16th day of August, 1871.
[L. S.] CHARLES W. BLEW,
Notary Public D. C.

STATE OF FLORIDA,
Duval County:

I, H. Bisbee, j'r, an attorney and practitioners of the United States in and for the northern district of Florida, hereby certify that I am the counsel for the defendants in the action set forth in the foregoing petitioners, and that as such counsel I have examined the proceedings against their defendants in the said action, and carefully inquired
40 into all the matters appearing in the said petition, and thereupon which said petitioners is founded; and that I verily believe the facts and statements therein to be true.

August 18th, 1871.

H. BISBEE, J'R.

(Indorsed:) No. 1. In circuit court of the United States for the northern district of Florida. Fanny E. Weems, executrix, et al., vs. George W. Atwood et al. Petitioners for the removal of cause from the State court. Filed 24 August, 1871. J. E. Townsend. H. Bisbee, att'y for petitioner.

41 UNITED STATES OF AMERICA:

The President of the United States to the circuit court, fourth judicial circuit, S't Johns County, or the clerk thereof, greeting:

For certain reasons and causes set forth in a petition to the judge of the circuit court of the United States for the northern district of Florida, in the fifth judicial circuit, and now on file in the clerk's office of said court, at Jacksonville, in said northern district of Florida, it is hereby

commanded that you, or one of you, under the seal of your said court, do send and certify enclosed, together with this writ, the record and proceedings in the case of Fanny E. Weems, executor of the last will and testament of Francis M. Weems, and in his own right, Benjamin F. Weems, James M. Weems, William H. Weems, and Joseph H. Meyer, plaintiffs, and George W. Atwood and Anna M. Atwood, his wife, and Adolph Mayer, defendants, with all things touching the same, as fully and wholly as they are before you now, to the clerk's office
42 of the said circuit court of the United States at Jacksonville, in the northern district of Florida; and you are further commanded, from and after the date of this writ, to stay all further proceedings in said cause between the said Fanny E. Weems, executor, et al., plaintiffs, George W. Atwood et al., defendants, and to discontinue the same in your court.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Jacksonville, in the northern district of Florida, this 24th day of August, A. D. 1871, and of the Independence of the United States of America the ninety-sixth.

J. E. TOWNSEND, *Clerk.*

(Indorsed:) No. 248. Northern district Florida, United States district court. Fanny E. Weems et al. vs. George W. Atwood. Certiorari. Issued 24 Aug. 1871.

Marshal's costs: Services, 2.00; expenses, 6.70—8.70. H. Bisbee, j'r, petitioner's att'y.

OFFICE U. S. MARSHAL, N. DIST. OF FLORIDA,
Aug. 25, 1871.

Theo. L. Lewis is hereby appointed special deputy to serve the within writ of certiorari.

SHERMAN CONANT, *U. S. M.*

Executed the within writ by delivering a true copy thereof to C. D. Lincoln, clerk of the circuit court for the county of S't John's, State of Florida, at his office in S't Augustine, Fla., at the same time showing him this original, this 28th day of August, A. D. 1871.

THEO. L. LEWIS,
Sp'l Dep. U. S. M.

43 In the circuit court of the United States, 5th circuit, northern district of Florida.

FANNIE E. WEEMS, AS EXECUTRIX OF THE last will & testament of Francis M. Weems, deceased, and in her own right, Benjamin F. Weems, Jas. M. Weems, William H. Weems, and Joseph H. Myers, *vs.* ANNA M. ATWOOD, AND GEORGE W. ATWOOD, her husband, and Adolph Myer.	Ejectment.

Fanny E. Weems, as executrix of the last will and testament of Francis M. Weems, deceased, and the said Fanny E. Weems, Benjamin F. Weems, James M. Weems, and William H. Weems, claiming title to the premises hereinafter described under the last will and testament of said Francis M. Weems, deceased, and Joseph H. Myers, claiming an equi-

entitled "An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes," and approved August 5th, 1861, and an act of the said Congress entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," approved June 7th, 1862; that the said action and suit has been commenced on account of the said title to said real estate set up and claimed by defendants, under the said sale made under the acts of Congress aforesaid by the tax commissioners aforesaid, and thus defendants are citizens and residents of the said northern district of Florida, and the said plaintiffs are citizens & residents of the State of Maryland, except the plaintiff Myers, who is a citizen of the State of Vermont; wherefore your petitioners pray that said cause be removed by proper process to the circuit court of the United States for said district.

39 Geo. W. Atwood, Anna M. Atwood, and Adolph Meyers, Geo. W. Atwood, agent.

STATE OF FLORIDA,
Duval County:

Personally appeared before me, , George W. Atwood, one of the defendants to the suit specified in the foregoing petition, who, being sworn, says that the facts set forth are substantially true and correct.

GEO. W. ATWOOD.

Subscribed and sworn to before me this 16th day of August, 1871.
[L. S.] CHARLES W. BLEW,
Notary Public D. C.

STATE OF FLORIDA,
Duval County:

I, H. Bisbee, j'r, an attorney and practitioners of the United States in and for the northern district of Florida, hereby certify that I am the counsel for the defendants in the action set forth in the foregoing petitioners, and that as such counsel I have examined the proceedings against their defendants in the said action, and carefully inquired
40 into all the matters appearing in the said petition, and thereupon which said petitioners is founded; and that I verily believe the facts and statements therein to be true.

August 18th, 1871.

H. BISBEE, J'R.

(Indorsed:) No. 1. In circuit court of the United States for the northern district of Florida. Fanny E. Weems, executrix, et al., vs. George W. Atwood et al. Petitioners for the removal of cause from the State court. Filed 24 August, 1871. J. E. Townsend. H. Bisbee, att'y for petitioner.

41 UNITED STATES OF AMERICA:

The President of the United States to the circuit court, fourth judicial circuit, S't Johns County, or the clerk thereof, greeting:

For certain reasons and causes set forth in a petition to the judge of the circuit court of the United States for the northern district of Florida, in the fifth judicial circuit, and now on file in the clerk's office of said court, at Jacksonville, in said northern district of Florida, it is hereby

commanded that you, or one of you, under the seal of your said court, do send and certify enclosed, together with this writ, the record and proceedings in the case of Fanny E. Weems, executor of the last will and testament of Francis M. Weems, and in his own right, Benjamin F. Weems, James M. Weems, William H. Weems, and Joseph H. Meyer, plaintiffs, and George W. Atwood and Anna M. Atwood, his wife, and Adolph Mayer, defendants, with all things touching the same, as fully and wholly as they are before you now, to the clerk's office
42 of the said circuit court of the United States at Jacksonville, in the northern district of Florida; and you are further commanded, from and after the date of this writ, to stay all further proceedings in said cause between the said Fanny E. Weems, executor, et al., plaintiffs, George W. Atwood et al., defendants, and to discontinue the same in your court.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Jacksonville, in the northern district of Florida, this 24th day of August, A. D. 1871, and of the Independence of the United States of America the ninety-sixth.

J. E. TOWNSEND, *Clerk.*

(Indorsed:) No. 248. Northern district Florida, United States district court. Fanny E. Weems et al. vs. George W. Atwood. Certiorari. Issued 24 Aug. 1871.

Marshal's costs: Services, 2.00; expenses, 6.70—8.70. H. Bisbee, j'r, petitioner's att'y.

OFFICE U. S. MARSHAL, N. DIST. OF FLORIDA,
Aug. 25, 1871.

Theo. L. Lewis is hereby appointed special deputy to serve the within writ of certiorari.

SHERMAN CONANT, *U. S. M.*

Executed the within writ by delivering a true copy thereof to C. D. Lincoln, clerk of the circuit court for the county of S't John's, State of Florida, at his office in S't Augustine, Fla., at the same time showing him this original, this 28th day of August, A. D. 1871.

THEO. L. LEWIS,
Sp'l Dep. U. S. M.

43 In the circuit court of the United States, 5th circuit, northern district of Florida.

FANNIE E. WEEMS, AS EXECUTRIX OF THE last will & testament of Francis M. Weems, deceased, and in her own right, Benjamin F. Weems, Jas. M. Weems, William H. Weems, and Joseph H. Myers,	Ejectment.
vs.	
ANNA M. ATWOOD, AND GEORGE W. ATWOOD, her husband, and Adolph Myer.	

Fanny E. Weems, as executrix of the last will and testament of Francis M. Weems, deceased, and the said Fanny E. Weems, Benjamin F. Weems, James M. Weems, and William H. Weems, claiming title to the premises hereinafter described under the last will and testament of said Francis M. Weems, deceased, and Joseph H. Myers, claiming an equi-

table interest in said premises under a contract of sale with said Francis M. Weems, by Fleming & Daniel and J. M. & J. H. Baker, their
44 attorneys, complain of Anna M. Atwood, claiming title to said premises, and George W. Atwood, her husband, and Adolph Meyer, under whom said Anna M. Atwood claims title, and who purchased said premises at the United States direct-tax sale hereinafter mentioned, who have been summoned to answer them in an action of ejectment for that whereas the defendants Anna M. & George W. Atwood are in possession of a certain tract or parcel of land situate, lying, and being in the city of S't Augustine, county of S't John's and State of Florida, and lying on the north side of the street leading from the southerly bridge across the Marias Sanchez Creek to the S't Augustine City Mills, and designated upon the plat of the same filed in a certain cause lately pending in the circuit court of the eastern circuit of Florida in and for S't John's County, wherein F. C. Humphries et al. were plaintiffs, and Lois H. Drysdale, executrix, and John Beard executor, of John Drysdale, were defendants, as lot four, and bounded as follows: Beginning at the southwest corner of the premises lately occupied by M'r's Susan
45 Murphy on said street and running thence north 18° 31′ west three (3) chains and $\frac{44}{100}$ths to the northeast corner of said lot; thence south 16° east one (1) chain and $\frac{96}{100}$ths to the northeast corner of the Panjaud lot; thence south 18° east one chain and $\frac{65}{100}$ths to the line of said street; thence eastwardly along said street north 71° 30′ east two chains and $\frac{60}{100}$ths to the place of beginning, containing by estimate one acre and forty-four one hundre'ths, more or less, as by reference to said plat will more fully appear, being the property owned and occupied by Francis M. Weems in his lifetime, and which was advertised and sold under the direct-tax commission of the United States for the direct taxes, and described in the advertisement of sale as "lot on block No. 46, bounded north by lot of C. Bravo; east by lot of C. F. Hopkins; south by Bridge street and lot of Panjaud & Burt," to which said plaintiffs claim title, and the defendants have received the profits of said land since the 21st of December, 1863, of the yearly value of five hundred dollars,
46 and refuse to deliver possession of said land to the plaintiffs or to pay them the profits thereof.

FLEMING & DANIEL.
J. M. & H. J. BAKER.

(Indorsed:) Circuit court of the United States, northern district of Florida. Fanny E. Weems et al. vs. George W. Atwood et al. Declaration filed this 18th day of Jan'y, A. D., 1875. Philip Walter, clerk. Fleming & Daniel, J. M. & H. J. Baker, pl'ffs' attorneys.

47 *Plea.*

In the circuit court United States.

FANNY E. WEEMS ET AL.
vs.
GEORGE W. ATWOOD ET AL.

And now comes the defendants and say that they are not guilty of the several trespasses in the declaration mentioned, and of this they put themselves upon the country.

H. BISBEE,
Att'y for Def'ts.

Personally appeared before me George W. Atwood, one of defenda'ts, who, being sworn, says that the foregoing plea is true in substance and in fact.

GEO. W. ATWOOD.

Sworn to and subscribed before me this 8th day of December, A. D. 1875.

C. L. ROBINSON,
Notary Public.

(Indorsed:) Fanny E. Weems vs. George W. Atwood. Filed Dec. 8th, 1875. Philip Walter, clerk. H. Bisbee, j'r, def'ts' att'y.

48 FANNY E. WEEMS, AS EXECUTRIX OF the last will and testament of Francis M. Weems and in her own right, Benjamin F. Weems, James M. Weems, William H. Weems, and Joseph H. Myers, plaintiffs,
vs.
GEORGE W. ATWOOD, ANNA M. ATWOOD, HIS wife, & Adolph Mayer, defendants.

The defendants, in answer to the plaintiffs, complaint, allege:

First. That they are not informed whether or not Francis M. Weems was lawfully posse'd as owner in fee-simple of the property in said complaint described as therein alleged.

Second. That defendants have no knowledge of the existence of the agreement alleged to have been made between the said Weems and Joseph H. Myers, except from allegations in the complaint.

Third. That defendants have no knowledge as to said Myers being let into possession of said property as alleged.

49 Fourth. That defendants have no knowledge of M'r Amos W. Corbett being constituted agent of the said Myers to take charge of the property, or to pay taxes thereon, but so far as they are advised they believe he had no authority to pay taxes thereon said property, either by the said Myers or by the said F. M. Weems, as plaintiffs allege.

Defendants deny that either of the plaintiffs were necessarily compelled to be absent from S't Augustine, or that they were taken away therefrom on account of the war, but allege it to be on account of the plaintiffs, illegal acts and conduct.

Fifth. The defendants allege that the' believe David R. Dunham was not assessor of United States taxes or of the United States tax commissioners. Defendants deny that the said F. M. Weems by himself or agent tendered the taxes due on the said property to anybody authorized to receive the same. Defendants allege that David R. Dunham aforesaid had no legal authority to receive the said taxes as agent
50 of the said tax commissioners under the acts of Congress, in said complaint alleged, or otherwise. Defendants deny that the said commissioners had any power to recognize any acts of the said David R. Dunham as their agent, and if such was the case that fact would vest the plaintiffs with any rights in this action.

Sixth. Defendants deny that the sale of the said property alleged in said complaint was irregular, fraudulent, or in anywise illegal or void.

Seventh. Defendants allege that the said sale was lawfully made by the commissioners aforesaid; that the commanding general of the Federal forces had established the military authority of the United States throughout the county of S't John's within the true meaning of the statute in such case made and provided.

Eighth. Defendants allege that in the sale of said property the law under which the same was made was complied with in all essential prerequisites, as well respecting the advertisements as otherwise.

Ninth. That the sale and certificate thereof specified in said
50½ complaint was regularly made, and in all essential particulars valid.

Tenth. Defendants allege that if the said F. M. Weems was held a prisoner of war, as alleged at the date of said sale, he was so held as the legal result of his disloyalty to the United States, and of his attempt to absolve his allegiance due thereto; and that he could at any time have secured his liberty by swearing allegiance to his government, the United States aforesaid; and defendants allege that if by arrest he was deprived of paying said taxes in person, such deprivation was the immediate and direct results of his own illegal acts.

Eleventh. That defendant A. M. Atwood did not purchase said land and premises with notice of any irregularity or any defect in the title thereto.

Twelfth. That defendants have no knowledge or information as to the death of Francis M. Weems, the probate of his will, or who, if any, his executors are, save by the allegations of said complaint; but
51 do not admit the allegations relative to the death, will, and executors aforesaid to be as alleged.

Thirteenth. That defendants do not admit to be true those matters and things in said complaint set forth, whereof in this answer these defendants say they have no knowledge, but demand due proof thereof.

Fourteenth. That plaintiffs have not sustained any damage from the defendants' possession of said premises.

Fifteenth. Defendants demand judgements for costs in this action and for such other relief as may seem equitable.

BISBEE AND ARCHIBALD,
D'f'ts' Attorneys.

STATE OF FLORIDA,
S't John's County, ss:

Personally appeared before me this 14th day Nov., 1871, Geo. W. Atwood, who, being duly sworn, says the facts in the foregoing answer so far as are positively stated are true, and so far as stated on information and belief he believes them to be true.

GEORGE W. ATWOOD.

Sworn to and subscribed to before me this 14th Nov., 1871.

CHA'S D. LINCOLN,
Cl'k Circuit Court S't John's County, Florida,
By FATIO DUNHAM,
Deputy Clerk.

(Indorsed:) In circuit court of the United States for the northern dist. of Fl'a. Fanny E. Weems, executrix upon the estate of Francis M. Weems, et al., vs. George W. Atwood et al. Answer. Filed Nov. 16, 1871. J. E. Townsend, cl'k. Bisbee & Archibald, def'ts' attorneys.

52 Circuit court, 5th judicial circuit, northern dist. of Florida.

WEDNESDAY MORNING, *Dec.* 8, 1875.

Court met pursuant to adjournment. Present, the Hon. Philip Fraser, judge.

The court was opened in due form by the crier.

* * * * * * *

FANNIE E. WEEMS ET AL.
vs.
GEORGE W. ATWOOD ET AL. } Ejectment.

This cause came on this day.
Pending argument of counsel, court adjourned.
Ordered that this court do now adjourn until to-morrow morning at ten o'clock.

THURSSDAY MORNING, *Dec.* 9, 1875.

Court met pursuant to adjournment. Present, the Hon. Philip Fraser, judge.
Court was opened in due form by the crier.
The entire day being exhausted in argument of counsel on motions, it is ordered that court do now adjourn until to-morrow morning at ten o'clock.

53 FRIDAY MORNING, *Dec'r 10th*, 1875.

Court met pursuant to adjournment. Present, the Hon. Philip Fraser, judge.
The court was opened in due form by the crier.

FANNIE E. WEEMS ET AL.
vs.
GEORGE ATWOOD ET AL. } Ejectment.

Defendants' attorney asked leave of the court to challenge the jury for the reasons set forth in the 820th section of the Revised Statutes. The matter was fully and ably argued by counsel for over three hours, when the court ruled that the jury could not be challenged for those reasons, to which ruling defendants' counsel excepts.
Plaintiff and defendants each made three peremptory challenges, after which the following jury were regularly empanneled and sworn to well and truly try the issue joined, to wit:
Jos. Green, Eugene Bigelow, Otis L. Keene, Edmund Green, Tho's Hodges, Adam Mattox, Edward Hogan, Tho's Roby, Cha's B. Husted, Tho's S. Swaim, Rob't Moorehead, Walter Ripp.
54 Plaintiffs offered as evidence certified copies of decrees in State court appointing certain commissioners to sell lands, &c. Defendant objected to their admission. Objection overruled by the court, to which ruling defendants' counsel took exceptions.
Plaintiff here rested, and, being the hour of adjournment, it was ordered that this court do now adjourn until to morrow morning at ten o'clock.

SATURDAY MORNING, *Dec.* 11*th*, 1875.

Court met pursuant to adjournment. Present, the Hon. Philip Fraser, judge.
The court was opened in due form by the crier.

FANNIE E. WEEMS ET AL.
vs.
GEORGE W. ATWOOD ET AL. } Ejectment.

Defendants' counsel offered as testimony tax certificate No. 52, to the

admission of which plaintiffs' counsel objected. Objection overruled by the court, to which plaintiffs' counsel excepted.

Examination of witnesses not being concluded at the hour of adjournment, it was ordered that this court do now adjourn until Monday morning at ten o'clock.

55 MONDAY MORNING, *Dec.* 13, 1875.

Court met pursuant to adjournment. Present, the Hon. Philip Fraser, judge.

Court was opened in due form by the crier.

FANNIE E. WEEMS ET AL. *vs.* GEORGE W. ATWOOD ET AL. } Ejectment.

This cause came on to be heard again this day, and not being concluded at the hour of adjournment, it is ordered that this court do adjourn until to-morrow morning at ten o'clock.

TUESDAY MORNING, *Dec'r* 14, 1875.

Court met pursuant to adjournment. Present, the Hon. Philip Fraser, judge.

Court was opened in due form by the crier.

FANNIE E. WEEMS ET AL. *vs.* GEORGE W. ATWOOD ET AL. } Ejectment.

This cause came on again this day, and argument of counsel not being concluded at the hour of adjournment, it is ordered that this
56 court do now adjourn until to-morrow morning at ten o'clock.

WEDNESDAY MORNING, *December* 15, 1875.

Court met pursuant to adjournment. Present, the Hon. Philip Fraser, judge.

The court was opened in due form by the crier.

FANNIE E. WEEMS ET AL. *vs.* GEORGE W. ATWOOD ET AL. } Ejectment.

This cause came on again to be heard this day.

The argument of counsel not being concluded at the hour of adjournment, it was ordered that this court do now adjourn until to-morrow morning at ten o'clock.

THURSDAY MORNING, *Dec.* 16, 1875.

Court met pursuant to adjournment. Present, the Hon. Philip Fraser, judge.

The court was opened in due form by the crier.

FANNY E. WEEMS ET AL. *vs.* GEO. W. ATWOOD ET AL. } Ejectment.

This cause came on to be heard again this day, and the jury

57 empanneled in this cause being called answered to their names, as follows:

Joseph Green, Tho's Hodges, Walter Kipp, Eugene Bigelow, Adam Mattox, Cha's B. Husted, Otis L. Keene, Edw'd Hogan, Tho's S. Swaim, Edmund Green, Tho's Roby, Robert Moorehead.

The argument of counsel being concluded, the case was submitted to the jury under the charge of the court; to which charge defendants' counsel excepts.

The jury returned the following verdict:

"We, the jury, find for the plaintiffs, Fannie E. Weems, Benj. F. Weems, James M. Weems, and William H. Weems, and that the defendants Anna M. Atwood & George W. Atwood are guilty of the ejectment and trespass as alleged in declaration, and that the said defendant Adolph Mayer is not guilty."

* * * * * * *

Ordered, That this court do now adjourn until to-morrow morning at ten o'clock.

58 *Judgement in ejectment.*

December term.

FANNY E. WEEMS ET AL.
vs.
GEORGE W. ATWOOD ET AL.

And now, on the sixteenth day of December, A. D. one thousand eight hundred and seventy-five, comes the plaintiff, by his attorney, & it appearing to the court that the defendant has filed his pleas to said action, and issue being joined, whereupon came a jury to try the issne, to wit: Jos. Greens, Tho's Hodges, Cha's B. Husted, Eugene Bigelow, Adam Mattox, Tho's S. Swaim, Otis L. Keen, Edward Hogan, Rob't Moorehead, Edmund Green, Tho's Roby, and Walter Kipp, who were duly sworn to try the issue joined, who upon their oath do say: "We, the jury, find for the plaintiffs, Fanny E. Weems, Benj. F. Weems, Ja's M. Weems, and William H. Weems, and that the defendants Anna M. Atwood & George W. Atwood are guilty of the ejectment and trespass as alleged in the declaration, & that the said defendant Adolf Mayer is not guilty."

Now, therefore, it is considered and ordered by the court that
59 the said plaintiffs, Fanny E. Weems, Benj. F. Weems, James M. Weems, and William H. Weems, do have and recover of and from the said defendants Anna M. Atwood & George W. Atwood, according to the finding of the jury, the premises mentioned in the declaration filed in this action, with all the tenements thereunto belonging, besides sixty-four dollars and seventy-five cents as costs of this action.

And it is further considered and ordered by the court that the writ of this court do issue directed to the marshall of the United States for the northern district of Florida to cause them, the said Fanny E. Weems, Benj. F. Weems, James M. Weems, and William H. Weems, to have possession of the said premises according to the force, form, and effect of their said recovery.

December 16, 1875.

60 In the circuit court of the United States, northern district of Florida. December term, 1875.

Be it remembered that at a term of the circuit court of the United States for the northern district of Florida, began and held at Jacksonville on the 6th day of Dec'r, A. D. 1875, a cause therein pending wherein Fanny E. Weems, James M. Weems, William H. Weems, Benjamin F. Weems, and Joseph H. Mayer were plaintiffs, and George W. Atwood, Anna M. Atwood, his wife, and Adolph Mayer were defendants, came on to be heard before the honorable Philip Fraser, the judge presiding, neither Justice Joseph P. Bradley nor Judge William B. Woods being present, at which day come the said parties, by their attorneys; and the defendants, by their attorneys, moved the court that the jurors of the panel be required to answer upon oath whether or not they had given aid and comfort to, or aided and abetted, the late rebellion against the Government of the United States, within the true sense and meaning of section eight hundred and twenty of the Revised Statutes of
61 the United States, for the purpose of exercising the right of challenging said jurors in case they came within the provisions of said section of the said Revised Statutes; and upon said motion the attorneys for plaintiff contended that said section was not a part of the laws of the United States, and that if said section was a part of the laws of the United States it was unconstitutional; and after argument of the respective attorneys, the said court denied defendants' said motion, and held and decided that said section was a part of the statutes of the United States as revised, but that said section was unconstitutional and void.

To which decision of the said court the defendants, by their attorney, then and there duly excepted, and this is defendants' first exception.

And thereupon the issues joined between the parties as appear by the pleadings come on to be tried, and the jurors aforesaid, whereof mention is made, came and were duly sworn to try the said issues joined as aforesaid, and thereupon the plaintiffs, to maintain the issues on their
62 part, produced and read in evidence to the jury proceedings in chancery in the circuit court of S't John's County, State of Florida, showing a sale of the land in question in this suit under a decree of said court of S't John's County, and a deed of conveyance of this lot executed in A. D. 1854 by commissioners appointed by the court as aforesaid to Francis M. Weems, under whom the plaintiffs claim title. The plaintiffs also proved that Francis M. Weems had the possession of the land in question from A. D. 1854 to A. D. 1860.

The plaintiff then produced and read in evidence to the jury a certified copy of the last will and testament of Francis M. Weems, for the purpose of showing the said Francis M. Weems devised the land in question to the plaintiffs, Fanny E. Weems, James M., William H., and Benjamin F. Weems. The said will is in the words and figures following, to wit:

In the name of God: Amen.

I, Francis Marion Weems, of the city of Baltimore, Maryland,
63 calling to mind the shortness of life, as well as the certainty of death, and being favored with a strong mind and deposing memory, for which I desire to be grateful to the Giver of all mercies, would depose of the worldly goods which He committed to my care as supervisor for a time, and for that object do hereby make this my last will and testament, to wit:

First. I consign with filial confidence to the care and keeping of my Heavenly Father my immortal spirit, which He gave, and which He will keep to that day, for He doeth all things well.

Secondly. After the payment of my lawful debts, I give and bequeath to my beloved wife, Fanny E. Weems, and our three sons, Benj. F., James M., and William H. Weems, the following-named property, namely: The house and lot in S't Augustine, Fla.; six (6) bonds of the Central Ohio Railroad for the sum of one thousand dollars each; three notes due me for the purchase of a house and lot in S't Augustine, Fla., by Joseph H. Myers, for the sum of $500 each; also a note, or the
64 amount due me, of John N. Ewell, of the city of New York, N. Y., for the sum of ten hundred dollars, with all my household and kitchen furniture and of any other property I may die possessed.

Thirdly. I hereby constitute and appoint my said wife, Fanny Elizabeth, my sole executrix as well as guardian of our two minor sons, Ja's M. and William H. Weems, and that she shall have the entire management of the within-named property for their united benefit; further, having the most explicit confidence in her direction as well as justice in the management of the trust committed to her trust, have only to add that it is in accordance with my will that upon the marriage of our eldest son, Benj. F. Weems, or a desire upon his part to enter into business for himself, that she shall in either event pay over to him an amount not exceeding a child's portion of the said named property, and in like manner to our second son, Ja's M. Weems, after he shall have arrived at the age of twenty-one years, reserving a like portion for herself and our said youngest son, William H. Weems.

I further invest her with power to sell the said named house
65 and lot in S't Augustine, Fla., and convey a title for the same and all other property heretofore named.

It is my desire that our beloved son Benj. F. shall to the best of his ability aid his mother in carrying out her views in the management of her trust.

Fourthly. The property herein named being unincumbered by debt, it it my will and desire that the honorable court for Baltimore City, M'd, will not require security of my said named executrix for administration on my effects or as guardian of our children.

Fifthly and lastly. In the event of my said named wife being disposed to change her situation by contracting a second marriage, she will be entitled to a child's portion only; and hereby revoking all other wills and testaments made by me.

In witness whereof I have hereunto set my hand and affixed my seal this (25th) twenty fifth day of September, eighteen hundred and sixty-five.

FRAN'S M. WEEMS. [L. S.]

Signed, sealed, published, and declared by Francis Marion
66 Weems as and for his last will and testament, before us, who, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

GEORGE POE.
ALBERT G. GILPIN.
HARRIET C. CHESNEY.

[U. S. stamp, $4.]

BALTIMORE CITY, *88:*

On the 9th day of November, A. D. 1865, came Fanny E. Weems and

made oath on the Holy Evangely of Almighty God that she doth not know of any will or codicil of Francis M. Weems, late of said city, deceased, other than the above instrument of writing, and that she received the same from the testator on or about the 1st day of October, 1865.

Sworn to in open court.

Test:

ISAAC P. COOK,
Register of Wills for Baltimore County.

BALTIMORE CITY, *ss:*

On the ninth day of November, 1865, came George Poe, Albert G. Gilpin, and Harriet E. Chesney, the three subscribing witnesses
67 to the aforegoing last will and testament of Francis M. Weems, late of said city, deceased, and made oath on the Holy Evangely of Almighty God that they did see the testator sign and seal this will; that they heard him publish, pronounce, and declare the same to be his last will and testament; that at the time of his so doing he was to the best of their apprehension of sound and disposing mind, memory, and understanding, and that they subscribed their names as witnesses to this will in his presence, at his request, and in the presence of each other.

Sworn to in open court.

Test:

ISAAC P. COOK.
Register of Wills for Baltimore City.

In testimony that the foregoing is a true copy, taken from wills liber J. P. C., No. 33, folio 34, being *our* of the records in the office of the register of wills of Baltimore City, I hereunto subscribe my name and affix the seal of my office this (5th) fifth day of January, in the year of our Lord eighteen hundred & sixty-nine.

68 Test:

J. HARMON BROWN,
Register of Wills for Baltimore City.

MARYLAND, *ss:*

I, Isaiah Balderston, chief judge of the orphans' court for Baltimore City, in the State aforesaid, do certify that the foregoing attestation of J. Harmon Brown, register of wills for said city, is in due form and by the proper officer, who is the custodian of the records and papers of the orphans' court for Baltimore City and is now in office.

Given from under my hand, at the city of Baltimore, this fifth day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

ISAIAH BALDERSTON.

STATE OF MARYLAND,
Baltimore City, set:

I, J. Harmon Brown, register of wills for Baltimore City, do hereby certify that the honorable Isaiah Balderston, by whom the above certificate was given and hath hereunto subscribed his name, was, at
69 the time of so doing, chief judge of the orphans' court for Baltimore City, duly elected, commissioned, and qualified.

In testimony whereof I hereunto subscribe my name and affix the seal

of the said court this fifth day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

Test:

J. HARMON BROWN,
Register of Wills for Baltimore City.

(Indorsed:) 1865. Copy. Francis M. Weems. Last will and testament. Offered by plaintiffs and read in evidence, and filed this 10th day of Dec., A. D. 1875. Philip Walter, clerk.

70 The plaintiffs, further to maintain the issues on their part, produced and read in evidence a certificate from the register of wills for Baltimore City, State of Maryland, which is in the words and figures following, to wit:

BALTIMORE CITY, *ss:*

The subscriber, register of wills for Baltimore City, doth hereby certify that it appears by the records in his office that letters of administration of all the goods, chattels, and credits of Francis M. Weems, deceased, was, on the tenth day of November, in the year of our Lord one thousand eight hundred and sixty-five, granted and committed unto Fanny E. Weems, the executrix by the last will and testament of the said deceased appointed.

In testimony whereof I hereunto subscribe my name and affix the seal of my office this fifth day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

Test:

J. HARMON BROWN,
Register of Wills for Baltimore City.

71 MARYLAND, *sct:*

I, Isaiah Balderston, presiding judge of the orphans' court for Baltimore City, in the State aforesaid, do certify that the foregoing attestation of J. Harmon Brown, register of wills for said city, is in due form and by the proper officer.

Given from under my hand, at the city of Baltimore, this fifth day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

ISAIAH BALDERSTON.

STATE OF MARYLAND,
Baltimore City, sct:

I hereby certify that the honorable Isaiah Balderston, by whom the above certificate was given, and who hath hereto subscribed his name, was, at the time of so doing, chief judge of the orphans' court of Baltimore City, duly elected, commissioned, and qualified.

In testimony whereof I hereunto subscribe my name and affix the seal of the said court this fifth day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

72 Test:

J. HARMON BROWN,
Register of Wills for Baltimore City.

(Indorsed:) Francis M. Weems. Certificate of letters offered by plaintiffs and filed and read in evidence this 10th day Dec., A. D. 1875. Philip Walter, clerk.

73 The plaintiffs, to further maintain the issues on their part, produced and read in evidence a contract between Francis M. Weems and Joseph H. Myers, which is in the words and figures following, to wit:

Articles of agreement made and entered into on the twenty-second day of May, A. D. 1860, by Francis M. Weems and Joseph H. Myers.

It is in the said articles agreed and stipulated by the parties hereto as follows:

The said Francis M. Weems agrees to sell his lot and premises and improvements of all kinds thereon, including trees, plants, &c., situated in Bridge street, by which it is bounded on the south, on the west by lot of Panjaud and part of lot lately owned by Lewis Duglau, on the north by lands of James M. Gould, and on the east by lot now owned by Charles Hopkins, for the sum of two thousand dollars, payable in cash, $500 down on the execution of this agreement and the balance in
74 three equal instalments of $500 each, the first payable, with interest from this date, on or before the first day of October, 1862; the second, with interest from this date, on or before the first day of October, 1863, and the third and last instalment on or before the first day of October, 1864, with interest from this date, and to have executed by himself and wife, in due form of law of the State of Florida, and to deliver the same, transferring and conveying to said Joseph Myers the said described property in fee to him and his heirs and assigns, with the usual covenants.

And the said Joseph H. Myers, in consideration of the premises, agrees to purchase the said property and pay therefor the said sum of $2,000 at the times and in the manner herein stated, with interest thereon as stipulated.

In witness whereof the parties to this agreement have hereunto affixed their names and seals on the day and year first above written.

FRANCIS M. WEEMS. [L. S.]
JOSEPH H. MYERS. [L. S.]

Signed, sealed, and delivered in presence of—
BENJ. A. PUTNAM.
GEORGE HOPKINS.

(Indorsed:) Contract offered by pl'tffs, and received in evidence, and filed this tenth (10th) day of December, A. D. 1875. P. Walter, clerk.

75 The plaintiffs, to further maintain the issues on their part, produced one Amos Corbett as a witness in their behalf, who, being sworn, duly testified substantially as follows, to wit:

I was acquainted with Francis M. Weems in his life-time. He was in possession of the land in question when I came to Florida, which was about the year A. D. 1859. It was before the late war. He was residing on this place at that time. Saw him at work on it. It is the same place M'r Atwood, one of defendants, now lives on. I was acquainted with some of the sons of Francis M. Weems, James M. and William H. Weems, and he spoke of another son, Benjamin F. Weems, who was absent at school. Am acquainted with the place, the land in controversy. Have lived on it.

Cross examined:

When I speak of the place Francis M. Weems lived on, I mean the place the defendant George W. Atwood is now living on.

Redirect:

76 Defendant George W. Atwood is now living on the place in controversy. I was not living on it when it was sold for taxes. I left the property in October, and it was sold for taxes 21st of Dec. following. This was in 1863.

M'r Myers made improvements on the land after his contract with Weems to purchase it. I rented the house on it from M'r Myers when he moved to Monticello, in the latter part of A. D. 1861, or first part of A. D. 1862. The place had a good house on it and a great variety of fruit trees. I remained on the property until shortly before its tax sale. M'r Myers put me in possession. I should think the place is worth twelve or fifteen thousand dollars. M'r Atwood has been in possession since 1863.

Plaintiffs also produced as a witness on their part Christobal Bravo, who, being duly sworn for plaintiffs, testified substantially as follows:

I was sixty-eight years old last July. I should think the place worth eight or ten thousand dollars. The plaintiffs gave further evi-
77 dence as to the rental value of the place and as to the actual market value of the place and then rested their case.

The defendants, to maintain the issue on their part, produced and read in evidence to the jury a certificate of tax sale and an assignment on the back of said certificate, which said certificate of assignment is in the words and figures following, to wit:

Tax-sale certificate No. 52.

UNITED STATES OF AMERICA:

This is to certify that at a sale of lands for unpaid taxes under and by virtue of an act entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," held pursuant to notice, at S't Augustine, in the county of S't Johns, in the State of Florida, on the (22nd) twenty-second day of December, A. D. 1863, the tract or parcel of land hereinafter described, situate in the city of S't Augustine, in the county and State
78 aforesaid, and described as follows, to wit: A lot on block No. (46) forty-six, bounded north by lot of C. Bravo, east by lot of C. F. Hopkins, south by Bridge street and lot of Paugeaud, and west by lots of Pageaud and Burt, was sold and struck off to Adolph Meyer for the sum of one thousand and fifty dollars and cents, he being the highest bidder, and that being the highest sum bidden for the same, the receipts of which said sum in full is hereby acknowledged and confessed.

Given under our hands this twenty third day of December, A. D. 1863, at S't Augustine.

L. D. STICKNEY,
W'M ALSOP,
Commissioners.

Know all men by these presents that I, the within Adolph Myers, for and in consideration of the sum of one thousand five hundred dollars, lawful money of the United States, to me in hand paid by Anna M. Atwood, wife of George W. Atwood, the receipt whereof I do hereby
79 acknowledge, have assigned, transferred, sold and let over, and

do by these presents assign, transfer, and let over unto the said Anna M. Atwood, and to her assigns, all my right, title, claim, and interest in and to the within certificate of sale, or intrument of writing, and every clause, article, or thing therein contained, and I do hereby constitute the said Anna M. Atwood my attorney, in my name, but to her own use, benefit and behalf, to take all and every legal measure which may be necessary and proper for the complete recovery and possession and enjoyment of the said assigned, transferred, & sold premises and their appurtenances, with full power of substitution.

Witness my hand and seal, at S't Augustine, in the county of S't John's, this sixth day of June, A. D. 1864.

D'R ADOLF MAJER.

Signed and delivered in presence of—
J. G. DODGE.
CHA'S D. LINCOLN.
(Acknowledgment here.)
For acknowledgement of execution of this paper by D'r Adolf Majer, see annexed sheet.

80 This is to certify that the following described property, viz, on block (46), bounded north by lot of Christobal Bravo, east by lot of Cha's F. Hopkins, south by Bridge s't and lot of Pageaud, west by lots of Pangeaud, and Burt & Peck, in S't Augustine, Fla., was bid off at the tax sale December 21, 1863, to Adolph Meyer, has not been redeemed, and that the time for redemption is expired.

AUSTIN SMITH,
D. RICHARDS,
Direct-Tax Commissioners for Fla.

Recorded this 30th November, A. D. 1872, on page 337 of book A, records miscellaneous, S't John's, Fla.

In testimony whereof I have hereunto set my hand and official seal, at S't Augustine, the day & year last above written.

CHA'S D. LINCOLN,
Clerk Circuit Court S't John's County, Fla.
By FATIO DUNHAM, *D. C.*

81 To further maintain their part, defendants, Amos Corbett was called as a witness and certified as follows:

I know the defendants Atwoods and defendant Adolph Meyer; don't know as I ever saw Myer in possession of the premises in question. I think he lived there. I was living in S't Augustine at the time. The provost marshal put me out of the property. M'r Meyer did not keep the property long after I left before M'r Atwood took possession. I believe Mr. Atwood has been in possession ever since.

Defendant here produced George W. Atwood, one of defendants, as a witness for them, who, being duly sworn, testified as follows:

I went into possession of the property in question in June or July, A. D. 1864. My possession has been permanent and open and notorious from that time to the present, no one claiming it except these plaintiffs. I should think the real value of the property now would be about ten thousand dollars. M'r Atwood also testified as to the fruit upon the place and its rental value.

82 Cross-examined:

Upon the cross-examination, gave further testimony as to the fruit trees upon the place and other improvements.

Cha's D. Lincoln was here called and sworn for defendants, and testified substantially as follows:

I know the defendants in this suit. The defendant Myer occupied the place for about a month after the tax sale. I know that M'r Atwood and family have occupied the place from the time he took possession until within a year ago. His possession was notorious and open, and it was known by everybody in S't Augustine and vicinity that he, Atwood, and his wife, claimed the property as their own.

Here the defendants rested their case.

The plaintiffs, in rebuttal, produced as a witness for them Harrison Reed, who, being duly sworn, testifies as follows, to wit:

83 I was one of the board of direct-tax commissioners for Florida at the time the sale of property for direct taxes was made at S't Augustine. I cannot state at what time the decree of the board for the sale was made at S't Augustine.

The commissioners had an office at Fernandina and also one at S't Augustine. The records were kept at Fernandina, which was the principal office.

M'r John S. Driggs was the secretary of the board at Fernandina. We had a clerk in possession of the office at S't Augustine. David R. Dunham was the clerk and assistant assessor of the board at S't Augustine. The assessment was made at S't Augustine early in 1863, in March or April. I suppose the assessment was posted in S't Augustine, as we followed the law in that respect. I did not attend the tax-sale at S't Augustine. There was but one sale made at S't Augustine under the direct-tax law. I did not think that the sale had been properly advertised and therefore I did not attend the sale. I notified the

84 other commissioners that I could not join in the sale for that reason. There was an order for publication of the sale made by the board of commissioners and the publication was commenced.

It was ordered published in the only existing paper in the district at the time. The notice of sale was published for three weeks consecutively, and was omitted the fourth week, and was published again during the fifth week, which last publication was immediately before the sale. The publication was made in a paper called the Peninsula, published at Fernandina. There was no newspaper published at S't Augustine at that time.

Witness is here shown a newspaper called the Peninsula, dated Nov. 19, 1863, containing said notice of tax-sale, and says "That is the paper in which the notice of said tax-sales was published, and it contains a publication of said notice. This notice was ordered by the board of commissioners to be published for four weeks."

Said paper is offered in evidence and the notice of the sale of

85 the property in controversy for direct taxes is read to the jury by the plaintiffs' counsels.

Harrison Reed continues:

As there was no paper issued the fourth week, I notified the publisher of the said paper that the advertisement would fall and that as soon as the other commissioners should arrive we would resume the advertisement. I was the only commissioner present when the advertisement was commenced. The transport arrived from the North on Tuesday, & in place of John S. Sammis, one of the commissioners who had resigned, M'r W'm Alsop arrived, and the other commissioner, M'r Stickney.

The board of commissioners then held a meeting and I stated what had occurred; that the fourth week there was publication of the paper and advertisement of the tax-sale, which, in my view, was a defect. I laid the matter before the board, and the two other commissioners, Stickney and Alsop differed with me, and treated lightly what I considered a defect and concluded to go on with and hold the sale, but I would
86 not go over to S't Augustine with them and attend the sale, for the reason that the publication of the fourth issue of the paper containing the notice of the sale was made on Tuesday which should have been made on the Thursday previous.

I cannot recollect the date of the paper published on Tuesday. I think it was dated back Thursday previous. The publication was for three weeks consecutively and should have been published the fourth week on Thursday, but the paper was not issued until the Tuesday following.

No new order of publication was made after I informed the commissioners that in my opinion there would have to be a new order. There was no publication in any other paper, I think. There may have been one in Washington. The office in S't Augustine was in second room of the corridor of the court-house, I think. Both of the offices we kept open constantly to receive taxes. If taxes were offered on any piece of property, the clerk was generally the recipient of the tax. If the commissioners were absent at the time the tax was paid, a memo-
87 randum was made by the clerk and on the return of the commissioners they signed a receipt for the same, or in some cases a number of receipts were signed in blank by the commissioners and left with the clerk to be filled up by him as the taxes were paid. M'r Dunham, the clerk, was authorized to receive payment of taxes at S't Augustine, Fla.

The commissioners received very little, if any, money for taxes. It was most always received by the clerk, who was authorized to give receipts of the commissioners for taxes received by him if they were left signed. Col. Sammis and I were in S't Augustine frequently from the time of the assessment to the sale. I cannot recollect the time we spent there. I think I was there when the assessment was made, but don't recollect how long before I visited the place again. I think before the sale. The assessment rolls and everything pertaining to the taxes at S't Augustine was kept at S't Augustine. There was one record-book of the commissioners which the secretary
88 kept at Fernandina. After opening the office at Fernandina, one commissioner was left there and the other two went to S't Augustine and established the office, made the assessment, and appointed David R. Dunham assistant assessor, and left him in charge of the office there. He was paid as assistant assessor by the government. It was understood that the taxes at S't Augustine were to be paid at the office there. We regarded the land on which the taxes were not paid within sixty days after the assessment as forfeited to the United States and subject to sale. After the said sixty days were expired, we held that only an owner or person having a valid lien on the property could pay the taxes on it—before that time any one could pay it. The secretary of the board, M'r Driggs, held the custody of the funds and made the deposits. The money received for taxes by M'r Driggs or M'r Dunham was considered as received by the commissioners. M'r Dunham
89 was instructed to place the money collected by him in the hands of M'r Driggs, the secretary of the board.

My recollection is that M'r Stickney and myself had a discussion as to

whether M'r Dunham should receive the tax from any one but the owner. The case presented was M'r's Putnam's. She was ordered across the lines by General Hunter. I told her that I thought her property was safe. M'r Dunham held the money tendered by M'r's Putnam for taxes. I don't know whether it was received or not subsequently. It was not received at the time.

Cross-examination:

I am sure that the next issue of the paper after the break was on Tuesday. I don't know the date of the first publication of the paper with the *the* notice of sale and I only know the date of the order of the publication as it appears in the paper. I don't remember the day of the month that Tuesday fell on. It was the month of the advertise-
90 ment, I think. It was the week before the sale that the publication was made on Tuesday. I am sure that there were not more than three issues before the omission. I have been a printer. The first publication of a legal notice is not always the date of the paper when it was put in. It is not usual to make the date of the notice conform to the date of the paper. It would not have altered the date of the notice if it was dated on the 12th and the first publication was on the 19th of November. I think the order of sale was made out and signed at Washington. There was no formal action of the board that the taxes should only be received from the owner of the property taxed. I don't recollect that any taxes were paid by the owners of property after the expiration of the sixty days. I don't recollect any case of the kind at S't Augustine. My recollection is that I was not at S't Augustine after the sixty (60) days for the redemption of property had elapsed. Mili-
tary transports were going between Fernandina and S't Augus-
91 tine every week. Civilians could travel on the steamers by getting passports. Every one could not get a passport. If one had business at S't Augustine, such as to give a satisfactory reason, it was in the discretion of the commander. I do not recollect that the notice of sale was published in Washington. I don't think that it was. I can't say positively that the notice was not published in Washington. I have no idea that there was any other publication, as the board gave no authority to publish the notice in Washington. There was considerable time after the lapse of the sixty (60) days till the sale.

The court adjourned till Monday morning.

DECEMBER 13TH, 1875.

The court met pursuant to adjournment.

Cross-examination of Harrison Reed resumed:

92 I recollect no case of tender of taxes made after the lapse of the sixty days. My recollection is that the commissioners established no uniform rule as to the receiving of the taxes after the sixty days expired. I don't recollect any specific case, as far as my recollection serves me. I don't know that any case was presented after the lapse of the sixty days for the redemption. After sixty days had transpired after the publication of the first notice, the property was regarded as forfeited and the parties were allowed to come in and redeem for sixty days longer. After the lapse of the second sixty days, I had no personal knowledge of the matter in S't Augustine. M'r Dunham was appointed assistant assessor and clerk, and was in charge of the office there. By redemption, I mean that for sixty days a party could pay the tax, after that there was a penalty and costs to be paid by the party. I don't think the com-

missioners had anything to do with the property after the sale.
93 I ceased to be one of the tax commissioners in Feb'y, 1864, when I was notified of the acceptance of my resignation. Austin Smith was my successor.

Redirect:

The practice of the commissioners was not to receive the tax from any one but the owner of the property or some one having a valid lien on the same. After the lapse of sixty days after assessment they merely followed what they considered the law without having made any formal rule. I don't recollect the date of M'r Dunham's appointment as assistant assessor. It was when we first went to S't Augustine. He was also made the clerk to take charge of the assessment-roll and receive the money for taxes, and he had charge of the office. After the establishment of the office I remained there but a few days at a time.

Cross-examination:

I mean by the practice of the commissioners that they under-
94 stood the law as to receiving taxes as I have stated.

Christoval Bravo, recalled by plaintiff, says:

I was in S't Augustine during the late war. I paid the direct tax on property in S't Augustine. I paid them to the clerk, David R. Dunham. M'r Dunham was in the office. It was generally understood that the taxes were to be paid M'r Dunham. I paid the taxes for a good many persons. I was acquainted with D'r Francis M. Weems. I offered to pay the direct taxes on the property in question. D'r Weems was sent back from Hilton Head to S't Francis Barracks, at S't Augustine, where I met him, and he told me that he wanted me to do him a favor, and requested me to go and pay his taxes. After breakfast I went to the office of the direct-tax commission and told M'r Dunham that I came there to pay the taxes of D'r Weems. He refused to receive the
95 **taxes, and told me that M'r Corbett had previously been there to pay D'r Weems' tax and that he had refused to receive the same. He did not tell me what the taxes were. I was prepared at the time to pay the said taxes if he had told me what the taxes were. I had the money in my pocket to pay them. He did not assign any reason for refusing to receive the taxes. This offer was made some time in August, before the sale of the property in question for taxes. It was in 1863. The piece of property that I offered to pay the taxes on is the property in controversy occupied by M'r Atwood.**

Cross-examination:

I offered to pay the taxes on the same day that I saw D'r Weems at the barracks. I saw him there about 8 or 9 o'clock. He requested me to pay his taxes. He did not give me the money, but told me where to get the money to pay his taxes. I promised him to pay the taxes. I did know how much the taxes were. I told M'r Dunham that I
96 came there to pay D'r Weems' taxes. He replied that M'r Corbett had previously been there to pay the taxes and was refused. I did not pull out any money and offer M'r Dunham. I had frequently before paid taxes to M'r Dunham. I did not afterwards offer to pay the taxes to the commissioners or any of them. I did not afterwards offer to pay the tax to M'r Dunham. I had previously paid taxes to M'r Dunham for M'r's Lopiz, Herbert Manly, John Usina, John Pallaun, and others. These taxes were paid just before I offered to pay D'r Weems' taxes. I think in July. I don't remember that I paid any taxes in December, just before the sale. I paid for a good many people

who were outside the lines. When I offered to pay D'r Weems' taxes is the only time the payment of taxes was refused me. When I paid taxes I think the receipts were signed by some of the commissioners. I can't say whether or not M'r Dunham signed for the commissioners.

M'r Dunham's name was on the receipt signed at the times I paid
97 the taxes. I never saw M'r Dunham sign the name of the commissioners. I don't think M'r Dunham gave me a reason for not receiving the taxes. I saw M'r Sammis in the city, I think, more than once.

Redirect:

I paid my own taxes in June or July. I paid them to M'r Dunham. It was the general understanding in town that M'r Dunham was in charge of the office authorized to receive the taxes. The office was in the south wing of the court-house. M'r Dunham was the person who was in charge of the office.

John S. Sammis, a witness sworn for and on behalf of the plaintiffs, says:

I was one of the board of direct-tax commissioners for Florida prior to the tax sale at S't Augustine. I was not a commissioner when the sale was made. I was one of the original commissioners. I established the office at S't Augustine in February of 1863. We got the south room of the court-house, in the south wing, which is now torn
98 down. I applied to Col. Putnam, who was in command, for a room in the court-house. He asked what room I would have, and I chose that. I remained there about a week the first time. After I established the office I left M'r Dorr, who was employed to survey the place, in charge of the office. I took M'r Driggs with me to Key West to establish an office there, and returned to S't Augustine in about ten days with M'r Driggs, and he took charge of the office. I also employed M'r Dunham when first in S't Augustine as assistant clerk under M'r Driggs. I employed M'r Dunham because he was better acquainted with the city and value of property there, and had been in office as clerk of the court and judge of probate, and had been there a long time. We left M'r Dunham alone in charge of the office, I think, about the third of June. When all the commissioners were North M'r Dunham was authorized to collect the taxes as assessed by the commissioners. We left a large number of receipts for taxes with him, signed by Harrison, Reed, and myself, and some blanks not signed. M'r Driggs was secretary and treasurer of the board, and held
99 the money. Dunham was instructed to put the money in the safe, and to pay it to M'r Driggs. M'r Dunham's acts in the collection of the taxes was considered binding on the commissioners. We were as much bound by the receipts delivered to M'r Dunham as though we had given them ourselves. During the sixty days after the assessment, we received the taxes from any one; it was a rule that after that time no one but the owner could redeem.

If the taxes were tendered by any one but the owner, or one having a legitimate lien, after the sixty days, it was the rule of the commissioners not to receive them. After the assessment, and before the sale, the commissioners were in S't Augustine but a small portion of the time. I was there more than any one else.

After the commissioners left there in June, they did not return until November. I was there in December, and there was not a commissioner there at the time. I saw D'r Weems in S't Augustine

100 after the property was advertised. He was sick. He told me that he was then under arrest. I asked him if he had paid his taxes. He said, no, but that he had left it with Col. Buffington to pay them. He may have mentioned M'r Corbett. I don't remember. When I returned to S't Augustine in November, the commissioners were not there. I was not a commissioner at the time. I think the commissioners got there on Thursday or Friday, and the sale took place on the next Monday. Only two commissioners, Stickney & Alsop, was there.

Cross-examination:

The commissioners did not get to S't Augustine until December. The commissioners did not pass a resolution that no one but the owner could pay the taxes. I don't think it was a matter of record. We talked it over, and that was our view of the law. I don't know that any tender was made the commissioners after the sixty days. I don't know when the assessment was completed. I was North from June to
101 November. We went on government transports. They ran once a week or oftener. The commissioners had an office at S't Augustine. A good many citizens travelled back and forth on the transports by getting a pass. Our practice was nothing else but our view of the law.

Redirect:

The commissioners practiced according to the law. As a commissioner I talked with the citizens of S't Augustine before I left for the North. When about to leave S't Augustine on the 3d of June, about twenty of the citizens came to me and offered to pay their taxes, appearing to be very anxious and uneasy about the matter. I said to them that I was not prepared to receive the taxes, and told them that the office was to be left in charge of M'r Dunham, to whom they could pay the taxes for sixty days, and after that the property would be forfeited.

Cross-examination:

102 I think the (60) sixty days had commenced when I spoke to the citizens. M'r Dunham was instructed to receive the taxes until the lapse of the sixty days.

Redirect:

M'r Dunham understood the view that the commissioners took of the law.

Cross-examination:

M'r Driggs was not in S't Augustine during the fall or summer.

Amos Corbett, recalled for plaintiff, says:

I was in possession of the premises in question until Oct., 1863. Was placed in possession by Joseph H. Myers. The place was advertised for taxes. I went to pay the taxes assessed on the property. Was instructed to pay the tax by Myers & Weems. Weems went away in June. I went to Dunham to pay the taxes on this lot. He refused to pay the taxes, saying that the title to the property was in Weems and not his wife, and that I might just as well talk about paying the taxes on Jeff. Davis' property. I had heard how much the taxes were on the property, and had money enough to pay them.

Cross-examined:

103 I did not offer M'r Dunham any money, but I was prepared to

offer it to him. I did not take out any money and tender it to him. I went twice to M'r Dunham to pay the taxes on the property. I offered the taxes in behalf of both parties, but had M'r Weems more particularly in view. I did not know the commissioners, nor any of them, and made no effort to pay the taxes to them, or to any one but M'r Dunham.

Redirect:

M'r Weems come back before the property was sold, and was anxious to pay his taxes, and was angry with me because I had not paid them before he saw me and knew the facts. This was when he asked M'r Buffington and M'r Brow to pay the taxes.

Cross-examined by defendant:

M'r Weems come back to S't Augustine in August. We did not stay a long time, but soon went over into the Confederate lines. I think he wanted to go. He knew that his taxes had not been paid when he went away into the Confederate lines. I was ready to pay taxes from
104 the time I offered to pay them up to the day of sale, and should have done it if I could. I went to D. R. Dunham, whom I understood was the receiver of taxes. I knew of no else to pay the taxes in question.

Charles D. Lincoln, called for the plaintiffs, testified as follows:

I was in S't Augustine in November, 1863. I knew of the advertisement of sale of property in S't Augustine for direct taxes. The publication was in the Peninsula. I took the paper, and my attention was called to the advertisement, because I anticipated purchasing.

There was an omission in the publication for a week. My impression is the publication was made three weeks before its break.

The copy of the Peninsular in evidence is here shown witness, and witness says: This was published on Thursday, after the omission of one week. The paper was published early in the next week, prior to Thursday. I saw M'r Morrell, the publisher, and went to his office with him. He showed me that his paper was dated back the Thursday previous, which would make it appear that the publication was regular, and part of the issue was dated ahead, on the Thursday following. I
105 spoke to M'r Stickney, one of the commissioners, in presence of M'r Alsop and other commissioners, about dating the paper back. He said it was all right.

Cross-examined:

Don't know positively the reason the paper was not issued at the regular date. I was under the impression that it was owing to some trouble in the office, either with workmen or material. I saw in the printer's office some papers dated back. This was on Tuesday or Wednesday; to the best of my recollection part of the issue was dated the Thursday previous, and part the Thursday following, and some the day it was issued. I think the paper was published till the sale. By the files of its paper it would appear that it was published regularly, for five weeks, but that was not the fact.

The plaintiffs here rested their case.

And defendants, to maintain the issues on their part, offered and read in evidence a certified copy of a resolution of the board of tax-commissioners, which is in the words and figures following, to wit:

106 (Copy.)

UNITED STATES OF AMERICA:

TREASURY DEPARTMENT,
Nov. 18th, 1872.

Pursuant to the act of Congress of the 22nd February, 1849, I hereby certify that the annexed paper is a correct transcript of so much of page eleven of the record book of the direct-tax commissioners for the district of Florida as shows in what capacity D. R. Dunham was employed by said commissioners, on file in this department.

In witness whereof I have hereunto set my hand and caused the seal of the Treasury Department to be affixed on the day and year first above written.

[SEAL.]

GEO. S. BOUTWELL,
Secretary of the Treasury.

107 FEBRUARY 17TH, 1863.

Ordered, that Hon. David R. Dunham, formerly judge of probate, and for many years clerk of the United States court at S't Augustine, be employed by this commission as assessor for the county of S't Johns, at a stated salary of ($75) seventy five dollars per month.

JOHN S. SAMMIS.
HARRISON REED.

Attest: (Sig.)
JOHN S. DRIGGS.

And the respective parties having submitted their testimony, and the several matters aforesaid, did then and there give his opinion, and charged the jury orally.

SECOND EXCEPTIONS.—The plaintiffs read in evidence of the will of Francis M. Weems the certificate of the register of the city of Baltimore, and the contract of sale between said Weems and Joseph
108 H. Myers, all which are made part of this bill of exceptions, and proved that said Weems, upon the execution of the contract of sale, put said Myers in the possession of the lot in controversy, A. D. 1860, and that he remained in possession until about October, A. D. 1863.

The testimony tended to show that the defendants the Atwoods were in possession of this lot of land at the time said will was made, claiming and holding the possession adversely. There was no testimony tending to prove the death of Francis M. Weems, except the will and certificate of said register. Plaintiff contended that under this will the lot of land in question was devised to Fanny E., James M., William H., & Benjamin F. Weems. On the contrary, the defendants contended that the will did devise this lot to the said Weems, and that no title passed to them under the will. Defendants contends further that the three promissory notes of Joseph H. Myers mentioned in the will, and in said contract of sale, were devised & bequeathed to the plaintiff, who claims as
devise's, and not the land which it offered; that deceased had sold
109 to said Myers; and further contended that as the said Francis M. Weems was out of possession, and that the lot was in the adverse possession of defendants when the will was executed, neither the title nor right of entry passed by the will to the plaintiff, or any of them.

And upon this branch of the case the court orally instructed and charged the jury substantially as follows, to wit:

The testimony shows that in 1865 Francis M. Weems made a will devising all his property, real and personal, to his wife and their sons, who are plaintiffs to this suit. The legal title was at this time the will was made in said Francis M. Weems. A point is made that Francis M. Weems, being out of possession, could not devise the property in question. The court charges you that this is not the law in the State of Florida; said Weems had a right of entry after default of payment of the purchase money agreed to be paid by Joseph H. Myers, or against any person holding possession of the property, and he could devise the property, and his right of entry.

110 To which decision and charge of the court the defendants by their attorney then and there excepted, and this is defendants' second exceptions.

THIRD EXCEPTION.—The evidence on the part of the plaintiffs tender to prove the newspaper called the Peninsular, in which the notice of the sale of the lot in question was to advertise, was issued three weeks consecutively, with the notices of the sale of the lot inserted. That the date of the first issue was on Thursday, the 19th day of November, A. D. 1863; that the second issue was on the 26th day of said November; that the third issue was on the 3rd day of December, A. D. 1863; that on the 10th day of said December, the day when the fourth regular issue of the paper would have been, the paper was not issued, and was not issued again until Tuesday, the 15th day of said December; that some of the copies of the paper thus was issued on the said 15th day of December, were dated on the 10th of December, and some copies were dated on the 17th day of December of said year, and some on the 15th day of

111 December, and upon this branch of the case the court instructed the jury substantially as follows, to wit:

It is contended by the attorneys for the plaintiff that the publication should have been for four weeks consecutively, and the omission of the issue of the paper on the 10th of December, and its not being issued again until the 15th day of said month, is a fatal defect in the advertisement of sale of the lot in question, and renders the sale of this lot by the tax commissioners void. The court declines to charge you, gentlemen of the jury. But the court does charge you that the sale must have been advertised in this paper for at least four weeks previous to the day of sale; though the law does not require the sale to be advertised four consecutive weeks, it does require the sale to be advertised at least four weeks previous to the day of the sale. To make four weeks there must be twenty-eight days. From the 19th day of November to and inclusive of the 15th of December is but twenty-six days, and if you

112 find from the evidence that the notice of sale was not published for twenty-eight days, the advertisement was not sufficient to give the commissioners authority to sell, and the sale was void, and the certificate of sale a nullity.

To which decision and charge of the said court the defendants by their attorneys then and there excepted, and this constitutes the defendants' third exceptions.

FOURTH EXCEPTIONS.—The testimony on the part of plaintiff tends to prove that the tax commissioners, after the lapse of sixty days from the time the assessment was completed and the amount of tax was fixed by the commissioners and the taxes became payable, understood the law to be that all the property upon which taxes were not paid within the sixty days became forfeited to the United States; that the right to pay taxes

after the lapse of sixty days was discussed and talked over by the commissioners, and it was the opinion and the view of the law of the
113 commissioners that after the expiration of the sixty days after the assessment was made and the amount of tax fixed, no taxes could be paid except by the owner in person or by some one who held a lien on the property, and the opinion and view of the law by the commissioners became generally known in the community to the tax-payer.

The testimony also tended to prove that the board of commissioners took no formal action upon the subject, and did not adopt any rule or resolution in writing that no taxes could be paid after the lapse of the sixty days except by the owner in person, but left the question open to be decided whenever any person offered to pay the taxes so as to raise that question.

The testimony also tended to prove that the question whether or not any one except the owner in person could pay the taxes after the lapse of sixty days from its assessment was never directly made before the commissioners, and that they were never required to decide the question, and that they never did decide such question by any action of the
114 board, and upon this branch of the case the said court instructed and charged the jury orally substantially as follows, to wit:

If the commissioners adopted a rule, whether in writing or not, that they would not receive taxes from any one but the owner or a person holding a lien upon the property after the lapse of sixty days from the publication of the assessment, it dispensed with the necessity of a tender of taxes, and the sale of the lot in question would be void.

To which decision and charge of the court the defendants, by their attorney, then and there excepted, and this constitutes defendant's fourth exceptions.

FIFTH EXCEPTIONS.—The testimony tended to prove that the commissioners opened an office in Fernandina and one in S't Augustine; that the principal office was at Fernandina, where the records of the commissioners were kept; that the office in Fernandina was first opened and the assessments of property at Fernandina was first made; that afterwards
115 and early in the spring of 1863 the office in S't Augustine was opened and the assessment was made of the property in Fernandina. That David R. Dunham was the clerk of the board and assistant assessor at S't Augustine, and was left in charge of that office, and verbally instructed and authorized to receive taxes and give receipts of the commissioners, which had been left in blank with him signed by the commissioners for that purpose. The testimony also tended to prove that the assessment was completed at S't Augustine about the first of June; that after the assessment was so completed, and fixed to the lapse of sixty days therefrom, the commissioners were not in S't Augustine but very little; that Commissioner Sammis and Reed was there a few days at a time; and that in the early part of the same none of the commissioners were in S't Augustine till just before the sale, three or four days before the sale, which occurred on the 21st day of December; that when Sammis was about to go away from S't Augustine, in the early part of June, some twenty of the citizens come to him on the street and
116 said to him that they were ready to pay their taxes, and that Sammis informed them that he was not prepared then to receive taxes, that he was going away, that M'r Dunham was in charge of the office and was authorized to receive their taxes, and had the assessment roll and blank receipts of the board. The defendants introduced in evidence a resolution of the board appointing M'r Dunham assistant assessor at S't Augustine.

The testimony also tended to prove that M'r Dunham did receive taxes from many persons; that M'r Bravo and M'r Corbett, as the agents of Francis M. Weems, and M'r Corbett, as the agent of Joseph H. Myers, went to M'r Dunham at his office and offered to pay the taxes on this lot in question, and that M'r Dunham refused to receive the taxes from them; that neither M'r Corbett nor M'r Bravo exhibited or counted out any money and tendered it to M'r Dunham, but that the latter, upon that offer to pay, refused to receive it.

The testimony also tends to prove that there was a government
117 transport going from S't Augustine to Fernandina about once a week and sometimes oftener, and that citizens of S't Augustine having business at Fernandina could obtain a pass from the military authorities to Fernandina upon the transports. Upon this branch of the case that the court charged the jury orrally as follows, to wit: If the taxes were tendered, or if all was done that could be done to tender them, that would amount to a tender, and would be sufficient to render the sale invalid. If the commissioners were absent from S't Augustine prior to the sale, and were not present in their office there to receive the taxes, but left a person to represent them there, and the citizens had no opportunity to pay their taxes to the commissioners directly, they would not be required to make a tender to the commissioners; the law does not require impossibilities. M'r Dunham was left in the office at S't Augustine to keep it open. He was not required to determine the right of persons to pay taxes. It was held out by the commissioners that M'r Dunham was the proper person to pay their taxes to. When a tender of
118 the taxes was made to M'r Dunham and he refused to receive the taxes, and there was no opportunity to pay the taxes to the commissioners, it was a sufficient tender.

To which decision and charge of the court the defendants, by their attorney, then and there excepted, and this constitutes defendants' sixth exceptions.

And the jury then retired under the charge and direction of the court to consider of their verdict.

Whereupon the court on the day of January, A. D. 1876, at the term aforesaid, did render judgment for the said plaintiffs, Harry E., James M., William H., and Benjamin F. Weems, and against the defendants, George W. and Anna M. Atwood, as appears of record, and inasmuch as the said several matters objected and exceptions aforesaid do not appear by record of the verdict and judgment aforesaid, the said defendants, by their attorney, did then and there tender to the court and prepare this, their bill of exceptions to the said opinions and
119 decisions of the said judge, and request him to sign the same, according to the form of the statute in such case made and provided, which is done this 10th day of May, A. D. 1876.

PHILIP FRASER, *Judge.*

(Indorsed:) Filed this 10th day of May, A. D. 1876. Philip Walter, clerk.

120 CLERK'S OFFICE,
U. S. Circuit Court, Northern Dist. Fla.:

I do certify that in the case of Fanny E. Weems et al. vs. George W. Atwood et al., ejectment, there was no written instructions given to the jury by the judge.

121 Supreme Court United States.

Know all men by these presents, that we, George W. Atwood and Anna M. Atwood, his wife, as principals, and Calvin L. Robinson and Noel Atwood as sureties, are held and firmly bound unto Fanny E. Weems, as executrix of the last will and testament of Francis M. Weems (deceased), and in her own right, Benjamin F. Weems, James W. Weems, and William H. Weems, in the sum of two thousand dollars to be paid to the said Fanny E. Weems, executrix, et al., their executors, or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our heirs, executors, and administrators firmly by these presents, sealed with our seals and dated this 24th day of December, A. D. 1875.

Whereas the above-named George W. Atwood and Anna M. Atwood have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in a suit entitled Fanny E. Weems, executrix, et al., vs. Geo. W. Atwood and Anna M. At-
122 wood, his wife, in the circuit court of the United States for the northern district of Florida:

Now, therefore, the conditions of the foregoing obligations is such that if the above-named Geo. W. Atwood and Anna M. Atwood shall prosecute the said writ of error to effect, and answer all costs and damages if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEO. W. ATWOOD. [SEAL.]
ANNA M. ATWOOD. [SEAL.]
C. L. ROBINSON. [SEAL.]
NOEL ATWOOD. [SEAL.]

Sealed and signed in the presence of—
JOHN H. MOLLESON,
EDWARD J. SEYMOUR.

STATE OF FLORIDA,
S't John's County, ss:

Personally appeared before me Noel Atwood, to me well known, who, being duly sworn, made oath and says that he is worth the sum of five thousand dollars, over and above all indebtedness whatever, and over and above every right of claim for homestead exemption, and that he has executed the within instrument for the purpose therein specified.

NOEL ATWOOD.

123 Subscribed and sworn to before me this 31st day of December, A. D. 1875.

J. S. STANBURY,
Notary Public.

The foregoing bond is hereby approved this 15th day of May, A. D. 1876.

PHILIP FRASER, *Judge.*

124 United States circuit court 5th judicial circuit, northern dist. of Florida.

FANNY E. WEEMS ET AL.
vs.
GEORGE W. ATWOOD ET AL. } Ejectment.

I hereby certify that the foregoing is a true and correct transcript of the record and proceedings in the above-entitled cause.

In testimony whereof I hereunto set my hand and affix the seal of said court at Jacksonville this 9 day of September, 1876, and of the Independence of the United States the one hundred and first year.

[SEAL.] PHILIP WALTER, *Clerk.*

(Indorsement on cover:) No. 236. George W. Atwood, Anna M. Atwood, & Adolph Mayer, plaintiffs in error, vs. Fanny E. Weems, as ex'tx of F. M. Weems, & in her own right, B. F. Weems, et al. N. Florida C. C. U. S. Filed 14th October, 1876.

Supreme Court of the United States.

EJECTMENT, No. 236.

—o—

GEORGE W. ATWOOD ET AL.,
Plaintiffs in Error,

vs.

FANNY E. WEEMS, EXECUTRIX &C, ET AL.,
Defendants in Error.

—o—

BRIEF OF H. BISBEE, JR.,

FOR PLAINTIFFS IN ERROR.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

Supreme Court of the United States.

EJECTMENT, No. 236.

GEORGE W. ATWOOD ET AL.,
Plaintiffs in Error,

vs.

FANNY E. WEEMS, EXECUTRIX &C, ET AL.,
Defendants in Error.

Brief of H. BISBEE, Jr., attorney for plaintiffs in error.

This is an action of ejectment brought in the Circuit Court of St. John's County, Florida, and removed to the Circuit Court of the United States for the Northern District of Florida. The pleadings in the State Court were according to the code practices then (but not now) in force; after removal to the Federal Court the pleadings were reformed, and those filed in the State Court, while printed in the record, may be considered as out of the case. The pleadings upon which the case was tried is in the form adopted in the State of Florida. Rec. pp. 13, 14.

The plaintiffs in the court below, for whom a verdict was found—defendants in error here—sue in the character of devisees, under the will of Francis M. Weems.

Fanny E. Weems also sues as executrix of the estate of Francis M. Weems.

Joseph H. Meyers was joined as a co-plaintiff, but no verdict was found for or against him, and as to him the case does not seem to have been disposed of.

The defendants, George W. Atwood, Anna M. Atwood, his wife, and Adolph Mayer, claim title to the property under a tax sale made under the acts of Congress of 1861, '62, '63, providing for the sale of taxes in insurrectionary districts. Judgment was recovered against the defendants, Atwoods, and writ of error is prosecuted to reverse it.

No objection is taken to the execution of the will, but the questions raised are:

First. Did the title to the premises pass to the plaintiffs by *the terms of the will?*

Secondly. Could the testator devise the premises, or right of entry, while the same was in the adverse possession of defendants?

Thirdly. Was the sale for taxes a valid sale?

These are the legal questions arising upon the merits of the case.

The errors assigned are:

First. That the court erred in deciding that section 820 of the Revised Statutes of the United States was unconstitutional and void, and that the right to challenge jurors for causes therein mentioned did not exist.

Second. The court erred in instructing the jury that the legal title to the property in controversy in this case was, at the time the will was made, in Francis M.

Weems, and that said Weems, though the premises were in the adverse possession of the defendants, at the time of the execution of the writ, could devise the same and the right of entry to the devisees named in the will.

Third. The court erred in instructing the jury that the title to the premises in question passed by the will to the devisees; that Francis M. Weems had the right of entry to the premises at the date of the will; and that the plaintiffs were entitled to recover upon the case made by them.

Fourth. The court erred in instructing the jury that the notice of tax sale of the property, in order to be legal, must have been advertised *twenty-eight days from the date of the first publication to the date of the last publication before the sale*, and that if the jury found from the evidence that the notice of sale was first published on the 19th day of November, A. D. 1863, and that the fourth publication was on the 15th day of December of said year, such notice of sale was insufficient, and the sale was void, and the certificate of sale a nullity. That the charge of the court upon the sufficiency of the notice of sale as set forth in the third exception of the bill of exceptions was erroneous.

Fifth. The court erred in instructing the jury that if the tax commissioners adopted a rule, whether the same was in writing or not, that they would not receive the taxes from any one but the owner in person, or a person holding a lien upon the property, after the lapse of sixty days from the publication of the assessment, the necessity of a tender of taxes was dispensed with and the sale of the lot in question would be void. Such instructions upon the testimony as set forth in the fourth exception to the bill of exceptions were not called for; and the court erred in not instructing the jury, whether or not

upon the testimony, the commissioners did adopt such a rule; and in instructing the jury what acts of the commissioners amounted to the adoption of such a rule, thus leaving to the jury a decision of a question of law.

Sixth. The court erred in charging the jury that the owner of the property in question was not required by law, nor was it his duty, to tender a pay of taxes at any other place than St. Augustine, Florida, when the principal office of the commissioners was at Fernandina, Florida.

Explanations.

The pleadings and proceedings in the State court, which are not material in this case, are found in the Record from p. 3 to p. 13, inclusive; also pp. 15 and 16.

Argument and points of law.

Upon the first error assigned, our position is that Congress has power to prescribe the qualifications of jurors in the Federal court, and that section 820 of the Revised Statutes has prescribed certain qualifications, and that all persons not possessing them are excluded from the jury box. Under this section no person who has aided and abetted voluntarily any rebellion against the United States is a competent juror. This statute excludes a class precisely as the statutes of Florida, and some other States exclude all persons above a certain age.

Upon what ground it can be claimed section 820 is unconstitutional we cannot comprehend. To be a juror is not an *inherent right in the citizen* like the right of property, but it is a duty imposed upon such male citizens as the Legislature may see fit to impose it. Therefore, the doctrine of the cases where it has been held that amnesty granted to a citizen engaged in the late rebellion

restored him to all his civil *rights, has no application* to the question here raised. Rec., p. 20.

United States vs. *Hammond et al.*, 2d Woods, C. C. Repts., 197.

Second and third errors.

The evidence upon which these errors and exceptions are based will be found in the Record on pp. 21 to 26 inclusive.

Francis M. Weems, the testator, under whose will the plaintiff's heirs, as devisees, sold the premises in question to *Joseph H. Myers* on the 22d day of May A. D. 1860, and on that day delivered possession thereof to Myers, the vendee, and executed a contract to convey, upon the payment of $2,000, five hundred of which was paid on the execution of such contract, and the balance of $1,500 in three annual installments, the last of which became due October first A. D. 1864. Rec., p. 24.

This contract was put in evidence by the defendants in error. It appears that Myers gave three promissory notes for $500 each for the three installments, and from the will it is apparent that the testator *bequeathed these three notes*, for which he had sold the premises, *and did not devise nor intend to devise* the premises. He expressly mentions these three notes in his will. Rec., 21.

The will was executed the 25th day of September, 1865, and it is not controverted that at that time the property was *in the adverse possession of the defendants*, having been sold for taxes December 22d, 1863. Rec., pp. 26, 35.

The court charged the jury upon this branch of the case as follows:

"The testimony shows that in 1865 Francis M. Weems made a will devising all his property, real and personal, to his wife and three sons, who are plaintiffs to this suit.

The legal title was at the time the will was made in said Francis M. Weems. A point is made that Francis M. Weems, *being out of possession*, could not devise the property in question. The court charges you that this is not the law in the State of Florida. Said Weems had a right of entry after default in payment of the purchase money agreed to be paid by Joseph H. Myers, as against any person holding possession of the property, and he could devise the property and his rights of entry."

Now, there is no pretense that there was any evidence of default in payment, except that from the lapse of time the notes had become due. On the contrary, the testator, nearly a year after the last installment became due, *chose to regard the vendor as not in default*, and affirmed the contract and the notes to be his property, received for the lot of land, and bequeathed the notes to the plaintiffs. This part of the charge of the court was, therefore, unwarranted.

We submit that the land in question could not pass by the terms of the will, and that the *testator did not intend* to devise the land. Had he so intended, he would not have mentioned the notes at all. We also contend that the testator had no power to devise the lot or premises, and *that the common law rule that a conveyance by deed or will of land in the adverse possession of a third party is void.*

The common law of England was expressly adopted in Florida by statute.

Bushe's Digest, Statutes of Florida, p. 139.

The only statute of Florida in relation to wills of lands reads as follows:

"Every person of the age of twenty-one years, being of sound mind, shall have power by last will and testament in writing to devise and dispose of his or her lands, tenements, and hereditaments, and of his or her estate, right, title, and interest in the same, in *possession*,

remainder, or reversion, at the time of the execution of the said last will and testament." * * * *Id.*, p. 75.

It is submitted that this statute adopts the common law rule, and limits the power to devise to an estate "in possession, remainder, or reversion," and it cannot be pretended that the testator had any estate "in possession, remainder, or reversion" at the date of execution of this will.

It may be said that he held the legal title to the land in trust for the vendee, (assuming the tax rate invalid.) This is true; but he held it subject to the limitation of his power to convey while the property was in the adverse possession of defendants. The statute above quoted has not modified the law in this respect.

A deed of conveyance by a grantor not in possession void.

13th Fla. R., 602.

This question, whether or not real estate or a right of entry can be devised by a person out of possession, has never been before the Supreme Court of Florida; but it is well settled that the common law does not permit such a devise, and that this rule prevailed in all the States until changed by statute.

2d vol. Washburn on Real Estate, 684;
4th vol. Kent's Com., 604;
2 Black. Com., 378;
1 Jannin on Wills, 87, 88;
16 How. S. C. R., 275;
3 Johns. Ch. R., 307, 312;
5 Johns. Ch. R., 441, 450;
10 Mass. R., 131.
9 Iredel, 288;
1st McCords, ch. 32;
8th Vesey, 283, 282;
3 Vesey, 669.

Myers is joined as a co-plaintiff, claiming an *equitable interest* in the premises (Rec. pp. 13, 14), and it is fair to presume that he was so joined *because he was ready to pay the balance* due of the purchase money upon a recovery of possession by the devisees, and a conveyance by them to him. But there was no verdict for Myers nor for Fanny E. Weems as executrix; the judgment is for the plaintiffs in *their character of devisees.*

We contend that on the death of the testator the right of entry, if any, existed in him, descended to his heirs, and *that his heirs only* could maintain ejectment. But plaintiffs do *not sue as heirs*, and have not brought or sought to maintain the suit on that theory.

Again, it was the duty of Fanny E. Weems, executrix, to convey to Myers, the vendee, under executory contract, upon the payment of the purchase money.

Bushe's Digest, pp. 72, 73.

Plaintiffs must recover, *if at all, in the character of devisees, in which they sue.*

1st Greenleaf's Ev., sec. 56, 58, 63.

Where plaintiff claims as devisees he must prove the death of the devisor.

2nd Greenleaf, sec. 310.

There was no proof whatever of the death of the testator in this case. The only pretence of evidence on this point was the certificate of register of wills that letters of administration were issued. Rec., pp. 23, 34.

Such certificate cannot be claimed to be evidence of the death of the testator.

Devisee must also prove in case of adverse possession that his ancestor re-entered in order to revert the seisen in himself.

2d Greenleaf, sec. 310.

Fourth error.

The charge of the court to the jury upon the sufficiency of the published notice of sale of the property for taxes was erroneous.

The act of Congress requiring the publication of notice reads as follows:

"That said board of commissioners shall be required, in case the taxes charged upon the said lots and parcels of land shall not be paid as provided for in the third sections of this act, to cause the same to be advertised for sale in a newspaper published in the town, district, parish, or county, where situate; and if there be no such newspaper published in said town, parish, district, or county, or if the publishers thereof refuse to publish the same, then in any other newspaper to be selected by said commissioners in said district, or in the city of Washington, for at least four weeks, and by posting notices of said sale in three public places in the town, parish, district, or county, within which said lands are situate at least four weeks previous to the day of sale."

12th Statutes at Large, p. 640.

That part of the charge of the Court on this branch of the case objected to is as follows:

"Though the law does not require the sale to be advertised four consecutive weeks it does require the sale to be advertised at least four weeks previous to the day of sale. To make four weeks there must be twenty-eight days. From the 19th day of November to and inclusive of the 15th day of December is but twenty-six days, and if you find from the evidence that the notice of sale was not published for twenty-eight days the advertisement was not sufficient to give the commissioners authority to sell, and the sale was void, and the certificate of sale a nullity." Third exception. Rec., p. 35.

The manifest error in this charge of the court is in holding that there must be twenty-eight days between the *first* publication and the *fourth*, instead of twenty-eight days *previous to the day of sale*. The sale occurred

on the 22d day of December, 1863, (certificate sale, Rec., p. 25,) *thirty-three* days after the first publication. Had the paper been published on the 10th of December, the regular day of issue, there would have been but twenty-one days between the first and fourth publication, yet the notice would have then been published *four consecutive weeks.* This was all the plaintiffs in the court below contended for, and which the court declined to charge.

This is so manifestly an error that it is not deemed necessary to cite authorities at length.

Blackwell on Tax Titles, p. 236–240.

The view of the court below in holding that the failure of publication of the paper on the 10th of December, and its publication on the 15th of December did not render the publication insufficient is sustained by authorities.

Rankendorff vs. *Taylor*, 4 Peters, R., 349;
Carr vs.. *Bellows*, 11 Foster, R., 501;
Blackwell on Tax Titles, 241.

Fifth error.

This is found in the fourth exception of the bill of exceptions. Rec., pp. 35, 36. The plaintiffs in the court below sought to bring the case within the rule laid down in 18th Vol. of Rep., p. 549.

In that case the court found as a matter of fact that the commissioners did *adopt, promulgate, and uniformly* enforce a rule that after the lapse of sixty days from the publication of the assessment the taxes would not be received from any person except the owner.

Here we contend that the testimony did not show that the Commissioners ever adopted any such rule. It was discussed by the members of the board, and the view of the law was entertained, that no one, except the owner

in person, could pay taxes after the lapse of sixty days from the assessment. It was left, however, as an open question, to be decided in each case as it arose. Vide testimony as stated in 4th exception; Record, pp. 35, 36.

The charge of the Court upon this point was as follows:

"If the Commissioners adopted a rule, whether in writing or not, that they would not receive taxes from any one but the owner, or a person holding a lien upon the property after the lapse of sixty days from the publication of the assessment, it dispensed with the necessity of a tender of taxes, and the sale of the lot in question would be void."

This charge of the Court presented the question to the jury in a too narrow point of view, and was calculated to mislead them. The Court should have charged the jury that the mere expression of the views of the law, held by the members of the Commission, would not be the adoption and enforcing of a rule, as in the case in 18th Wal. We submit that this part of the case was not properly given to the jury, and that it was error in the Court to so charge the jury as to mislead them, in drawing a conclusion from the evidence.

If any tax-payer acted upon a rumor as to the views of the law held by the Commissioners, he did so at his peril; he was bound to know the law, and to conform to it, and the Court should have so charged.

Sixth Error.

The testimony showed that the *principal office* of the Commissioners was at Fernandina, Fla.; that they opened another office at St. Augustine, where the lot in question was located, and left a clerk in charge of it, who, however, was not authorized to receive the taxes or determine who was entitled to pay. *Vide* fifth exception, Rec., pp. 36, 37.

There was evidence that the agent of the owner of

the lot in question offered to pay the taxes to this clerk in charge of the office at St. Augustine. There was no evidence that the taxes were ever tendered to the Commissioners at their principal office at Fernandina.

The court charged the jury as follows:

"If the Commissioners *were absent from St. Augustine* prior to the sale, and were not present in their *office there* to receive the taxes, but left a person to represent them there, and the citizens had no opportunity to pay their taxes to the Commissioners directly, they would not be required *to make a tender to the Commissioners;* the law does not require impossibilities. Mr. Dunham was left in the office at St. Augustine to keep it open. He was not required to determine the right of persons to pay taxes. It was held out by the Commissioners that Mr. Dunham was the proper person to pay taxes to. When a tender of taxes was made to Mr. Dunham, and he refused to receive the taxes, and there was no opportunity to pay the taxes to the Commissioners, it was a sufficient tender." Rec., p. 37.

This was tantamount to saying to the jury that it was not the duty of the citizen to tender the taxes at the principal office at Fernandina. The citizen knew that the Commissioners could not deputize Mr. Dunham to receive the taxes for them and give receipts for the same, and if the Commissioners were not at this branch office in St. Augustine, it was the duty of the tax-payers to tender the taxes at the principal office in Fernandina. The Commissioners were not required to have an office in *every county* in which lands were assessed and sold. They were required to have but one office. It was the duty of the tax-payer to pay his taxes there, and not abandon his property, knowing the taxes had not been paid.

We submit that this charge of the Court was erroneous and that the judgment of the Court should be reversed.

H. BISBEE, JR.,
Attorney for plaintiff in error.

SUPREME COURT OF THE UNITED STATES.

No. 236.

GEORGE W. ATWOOD, ANNA M. ATWOOD, AND ADOLPH MAYER, PLANTIFFS IN ERROR.

VS.

FANNY E. WEEMS, AS EXECUTRIX OF F. M. WEEMS, AND IN HER OWN RIGHT, B. F. WEEMS, *et al.*

BRIEF.

JAMES M. BAKER,

Attorney for Defendants.

Florida Union print.

IN SUPREME COURT

OF THE

UNITED STATES.

GEORGE W. ATWOOD, ANNA M. ATWOOD, and ADOLPH, MAYER,
Plaintiffs in Error,

vs.

FANNY E. WEEMS, Ex'x of F. M. WEEMS, and in her own right, B. F. WEEMS, *et. al., Defendants.*

BRIEF.

The first error assigned in this case, involves the rights to challenge jurors in the United States Circuit Court, under the provisions of section 820 of the Revised Statutes of the United States.

Section 1 of the act by Congress, making participation in the insurrection or rebellion against the United States, a cause of disqualification and challenge of grand and petit jurors, was passed June 17th, 1862, which said section was repealed by the latter clause of section 5 of the act of Congress, entitled "An Act to enforce the provisions of the Fourteenth Amendment of the Constitution of the United States, and for other purposes." Passed April 20th, 1871.

The said section 5 of the act of April 20th, 1871, appears in the Revised Statutes as section 822, but amended by striking out the latter clause, which repealed the first section of the act of June 17th, 1862.

The 820th section of the Revised Statutes, adopted June 22d, 1874, re-enacted section 1 of the act of June 17th, 1862, previously repealed, and again made participation in the late rebellion a cause of disqualification and challenge of jurors.

Thus it appears that the law under which was claimed the right to challenge said juror, for causes therein stated, was not passed until June 22d, 1874.

Previous to the adoption of said section 820 of the Revised Statutes, to-wit: on the 25th day of December, 1868, the President of the United States issued his proclamation, extending universal amnesty and pardon to every person who directly or indirectly participated in the late rebellion, restoring them to all rights, privileges and immunities under the Constitution and laws of the United States.

Said section 820 of the Revised Statutes, invoked as authority for challenging the jurors in the Court below, was passed in violation of the 3d clause of the 9th section of article 1 of the Constitution of the United States, which provides that "No bill of attainder or *ex post facto* law shall be passed."

"A Bill of Attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment is less than death, the act is termed a bill of pains and penalties.

"Within the meaning of the Constitution bills of attainder include bills of pains and penalties. These bills are generally directed against individuals by name, but they may be directed against a whole class."

Cummings vs. the State of Missouri.
4th Wallace, page 323.

Section 820 is a legislative act, which, if enforced, would deprive a large class of citizens of a civil and legal right, as a penalty or punishment for having participated in the late rebellion against the United States, nearly ten years previous to its passage, and "without a judicial trial."

Said section 820 also imposes a penalty or punishment for an act which was not so punishable at the time it was

committed, and is an "*ex post facto* law" within the meaning of the Constitution of the United States.

This law was enacted nearly six years after the President of the United States issued his proclamation of general amnesty and pardon. And this Court, in commenting on the effect of the Executive's pardon so issued, as applied in the case of *ex parte* Garland, 4th Wallace, 380, say: "That Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender, and when the pardon is full, it releases the punishment, and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching. If granted after conviction, it removes the penal ties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

It was two years after this decision by the highest judicial tribunal of our country, and in view of this opinion as to the effect and operation of a pardon, that the President issued his said amnesty proclamation.

It has been urged that said act does not prescribe any punishment, but leaves the party to disqualify himself or not; to determine his own guilt or innocence; to try and condemn or acquit himself. Yet if he refuses to answer or take a prescribed oath, he is in effect convicted, and the penalty at once attaches—he is deprived of civil and legal right.

In this case, it appears that the only motion made by counsel was to require the jurors on the panel to answer whether or not they had committed the offense specified in section 820 of the Revised Statutes. It is stated in the record, page 20, that "the defendants by their counsel moved the Court, that the jurors on the panel be required to answer upon

oath whether or not they had given aid and comfort—or aided and abetted the late rebellion against the Government of the United States—within the true sense and meaning of section 820, of the Revised Statutes of the United States."

A juror should not be required to answer—such questions—and disqualify himself. No person is bound to accuse himself, or to answer any question that would have a tendency to expose him to a penal disability, or liability to any kind of criminal charge.

1*st Greenleaf*, § 451, 453.
5*th Amendment to the Constitution.*

The Statute does not require the juror to answer questions touching his qualifications under the provisions and disabilities therein specified. And no offer was made to prove the disability by other testimony.

The record shows that the only motion made, or question raised by counsel, as to the force and validity of said section, was the motion to require jurors to answer upon oath "whether or not they had given aid and comfort, or aided and abetted the late rebellion." etc.; and whether the act should be held Constitutional or not. The court ruled properly in not requiring an answer to such questions, and in refusing to allow refusal to answer as a ground of challenge.

The record in this cause (page 20), shows that no motion was made by defendant's counsel to require the jurors to take the oath prescribed in section 821 of the Revised Statutes, and that no ruling of the Court was made upon the provisions of that section.

It is urged that the said act, although passed expressly for the purpose of disqualifying a large class of citizens from serving on juries in the United States Courts, does not deprive such citizen of any civil or legal rights, and that such disqualification is not in the nature of a penalty.

The Congress of the United States has recognized the principle, that to serve on juries is a "civil and legal right" of every citizen. In the act of March 1st, 1875, entitled "An act to protect all citizens in their civil and legal rights," the preamble asserts the following general principles:

"Whereas, it is essential to just government, we recognize the equality of all men before the law, and hold that it is the duty of the Government in all its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law."

The 4th section enacts:

"That no citizen possessing all other qualifications which are or may be provided by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude;" and makes it a misdemeanor for any officer to exclude any citizen from serving on the jury for such cause, punishable by fine of five thousand dollars.

U. S. Statutes, 1875, 2 *Ses.*, *p.* 335.

In this act of Congress the "civil and legal right" of every citizen to serve on the juries of the United States Courts, is declared to be a "great fundamental principle," and is secured to the colored race under heavy penalties.

This "civil and legal right" had long previously vested in the white race, and will doubtless be protected whenever assailed.

Having shown that the privilege of serving on the juries of the United States is a civil and legal right, it seems clearly to follow that a law depriving a citizen, or a class of citizens, of that right, would be, in the meaning of the Constitution, a bill of pains and penalties.

This doctrine is sustained by the decision of this Court in the case of Cummings *vs.* the State of Missouri, 4th Wall., 320: "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending, and the causes of the deprivation, determining this fact."

The second error assigned, raises the question of law, as to the right of the testator Francis M. Weems, to devise the land in dispute, which was held adversely at the date of the will.

The Court charged the jury, that the legal title to the property was in Weems at the time the will was made; and that under the laws of Florida, said Weems had a right of entry after the default of payment of purchase money by Joseph H. Myers, or against any other person holding possession of the property; and he could devise the property and his right of entry."

Under the Statute of Wills of the State of Florida, every person of the age of twenty-one years, being of sound mind, shall have the power by last will and testament, in writing, to devise and dispose of his or her lands, tenements and hereditaments, and of his or her estate, right, title and interest in the same, in possession, remander or reversion, at the time of executing said last will and testament."

Thomp. Digest, page 192.

That the legal title to the property in question was vested in Francis M. Weems, at the date of the will, under the deed given in evidence, is not questioned. The bill of exceptions does not contain a copy of the deed under which Weems claims title, and no exceptions were taken to the charge of the Court on the validity of his title.

The general rule of English law that a disseisee of real estate cannot dispose of their property by will, has long since been doubted, even in English Courts. Inasmuch as the doctrine had its origin under the Feudal system, when possession in its technical sense denoted complete investiture, with all its solemnities, whereby the freehold passed to the disseisor, and estates which grew out of wrongful acts were often maintained, because of the great jealousy the law had of permitting the transfer of rights in land from one person to another, from which arose the laws of maintainance, lest the poor should be injured and harrassed by such rights being transferred to the rich and powerful.

Such conveyances of lands in adverse possession were held to be involved, and the same principle applied to devises after the Statute of Wills, because they were regarded as a species of conveyance, nowithstanding the spirit and reason

of the law did not apply to devises. The heir-at-law (his ancestor dying intestate), to whom the title and interest in lands would descend, would have his right of action to recover any such property wrongfully and adversely held from such ancestor.

And for the further reason, that a person in view of death would not devise his real estate to any one for the purpose of promoting vexatious litigations.

The hardship and unreasonableness of the construction thus given to the Statute of Wills, was felt to be so great, that more liberal and comprehensive views were adopted in the case of *Jones vs. Doe*, 3d T. R. p. 87, where it was held that whatever was descendable was devisable. That if there is an interest in land known to the law, which would descend to the heir, the ancestor has the right to dispose of such by will, because it would not be a devise of a "bare possibility," but of a possibility coupled with an interest.

In the case of *Taylor & Atkins vs. Horde*, 1 Burrows, page 60, Lord Mansfield says, that "taking possession under a judgment in ejectment never could be a disseisin of the freehold," which clearly shows that the technical meaning of disseisen under the English law, was more than mere adverse possession, it meant adverse seisin of the freehold. "Disseisin is putting a man out of seisin and ever implies wrong; but dispossession or ejectment is putting out of possession, and may be by right or wrong."

1*st Burr.*, 63.
Co. Lit., 153.

Actual disesisin under the Feudal laws, which required the consent of the lord, together with all the forms and ceremonies of investiture, differs so widely under our laws from mere adverse possession, that the rules and principles which grew out of the military tenures of England, could have no reasonable application here.

Varrick vs. Jackson, 2 *Wend.*, 166.
4 *Cruise Tit. Dev., ch.* 1, *sec.* 2.
4 *Kent Comm., p.* 512.

Under the plain construction of our Statute of Wills, above quoted, every person who has a valuable interest in lands, has the power to dispose of such interest by will.

The Statute of the State of Florida establishing rules o descent, provides that "whenever any person, having title to real estate of inheritance shall die intestate as to such estate, it shall descend in parcenary to the male and female kindred."

Thomp. Dig., p. 188.

Under this statute the "title to real estate by inheritance descends to the heir-at-law without limitation or restriction as to possession, and if descendable, the property was devisable. Buller J., in the case of *Jones vs. Doe*, says both must be governed by the same principle.

If Weems had a title to the land in dispute, and a right of action which would descend to his heirs, it would be a peculiar hardship if his will, devising such title to them as heirs-at-law, would deprive them of their right to the land, and divest them of all interest which would otherwise have descended to them.

Smith vs. Van Duzen, 15 *Johns. p.* 345.

The evidence shows that the plaintiffs in this case were the heirs of Francis Weems (page 24). The widow, under the laws of Florida, had the right to elect to take a child's part in lieu of dower, and under the code then in force, had a right to join in this action.

Thomp. Digest, p. 185

It further appears from the testimony, that Weems contracted to sell said lot of land to J. H. Myers, who went into possession under the contract of sale, and made improvements upon the property.—*P.* 24 & 25 *of record.*

Weems delivered possession to Myers under contract of sale, but still held a reversionary interest, and right of entry upon default of Myers to pay the purchase money. Our Statute of Wills expressly authorizes any person to devise "his or her estate, right title, or interest in possession, remainder or *reversion.*"

The defendants in the Court below introduced in evidence a tax certificate signed by L. D. Stickney and Wm. Alsop, as tax commissioners, under which they claimed title to the lot of land in dispute. Plaintiffs denied the validity of the sale, and claimed that the certificate was only *prima facie* evidence

of title. They introduced testimony to show that the sale was not made according to the powers given by the statute, and conferred no title on the purchaser.

It is a general rule that when the requisites in tax proceedings which the law has provided for the protection of the tax-payer are not complied with, any sale of property based upon it, will be void. "When property is taken under statutory authority in derogation of a common right, every prerequisite of the statute having semblance of benefit to the owner, must be complied with, or the proceedings will be ineffectual. *Cooley on Const. Law*, 521.

In the case of Thatcher vs. Powell (6 Wheaton), the same doctrine is forcibly expressed, "That no officer can sell or convey a good title to the land of another, unless authorized to do so by express law, is one of those self-evident propositions to which the mind assents without hesitation, and that the person invested with such power, must pursue with precision the course prescribed by law, or his act is invalid, is a principle repeatedly recognized by this Court."

Williams vs. Peyton, 4 *Wheaton*, 71.
Early vs. Doe, 16, *Howard*, 617.

These decisions sustain the doctrines held on this subject in the different States, and clearly expresses the constitutional guarantee given to every citizen, that he cannot be deprived of his property except by "due process of law."

The 7th section of the act of June 7, 1862, which makes tax sale certificates evidence of the regularity and validity of the sale, does and could not take away the right of every citizen, under the principles of national right as well as constitutional law.

"A statute which would make a tax deed conclusive of a complete title, and preclude the owner from showing its invalidity, would be void, not being a law regulating evidence, but an unconstitutional confiscation."

Cooly Const. Law, 367.

The 7th section of the act of 1862, in view of these constitutional limitations, can only be construed as a law regulating the evidence in tax title suits, and only changes the burden of proof of the invalidity of the tax sale from the purchaser to the owner. Such seems to be the construction given it by this Court.

In the case of *Cooley vs. Conner* (12 *Wall*, 391), Mr. Justice Strong, in commenting on the exclusion of a tax certificate as evidence in the courts below, says: "Had this certificate been admitted it would, by force of the statute, have amounted to *prima facie* evidence, as well of the regularity and validity of the sale, as of the title of the purchaser. It would, therefore, have cast upon the plaintiffs the burden of showing affirmatively, that the sale was irregular and invalid."

The right of the owner of property sold for taxes under the act of 1862, to show the invalidity of such sale has been recognized, and such proof held to be admissible in the following cases decided by this court:

Bennett vs. Hunter 9, *Wall.* 326.
Cooley vs. Conner 12, " 391.
Turner vs. Smith 14, " 553.
Tacey vs. Irwin 18, " 549.

Also in Peay vs. Schenck, 1 *Woolworth, C. C. R.* 173.

The evidence in this case shows that the commissioners failed to comply with the law requiring notice of sale to be given at least four weeks previous to sale.

It appears that the newspaper in which the notice was given, was not issued consecutively; that there was a failure in the publication of the paper during the third or fourth week; that the paper containing the notice was issued during the subsequent week, and was fraudulently dated, as if issued the previous week, so as to make it appear that the advertisement was regular.

Harrison Reed, one of the Tax Commissioners, called attention of the Board to this failure to comply with the law, and for that reason refused to attend and participate in the sale. (P. 27.)

Charles D. Lincoln, in his testimony, corroborates Reed. Says that the omission was in the third week; that the paper was published during the week following; that part of the paper so published was dated Thursday of the week prior, and

a part on Thursday after the issue, "which would make it appear that the publication was regular." (P. 33.)

The Court submitted this testimony to the jury, with the charge, that if "they found from the evidence that the notice of sale was not published for twenty-eight days, the advertisement was not sufficient to have given the Commissioners authority to sell, and the sale was void, and the certificate a nullity." (P. 35.)

The Court held that it was not necessary that the publication should be made four weeks consecutively, but the publication must actually be made for twenty-eight days, without counting the week omitted, or the notice would not come within the requirements of the statute: "at least four weeks."

In another view of the evidence, it is clearly shown that the notice was not published "for at least four weeks." It has been held by this Court "that a week is a definite period of time, commencing on Sunday, and ending on Saturday."

Ronkendorff vs. Taylor's Lessees, 4 *Peters*, 98.

One entire week having been omitted, it could not be counted in making up the four weeks, or twenty-eight days, positively required by the statute.

The case of Delogney *vs.* Smith, 3 Louisiana, 418, decides a similar omission to be fatal.

The charter of New Orleans required three months' notice of a sale to be published in a newspaper, but was silent as to whether the sale should be published three months immediately preceding the sale. The advertisement was inserted during the months of December, February and March, omitting January. The sale took place April 7th, in pursuance of the notice, but was declared void by the Court.

In the case of Cooley *vs.* O'Conner, above quoted, it was held that the question "whether the demands of the statute respecting notice of sale had been complied with, was a mixed question of law and fact, and should have been submitted to the jury."

The Court below submitted the law and the facts to the jury, in accordance with this opinion. The correctness of the principle of law, given in charge to the jury, will not be questioned, and on the facts, the Court charged as follows: "If

you find from the evidence that the notice of sale was not published for twenty-eight days. The advertisement was not sufficient to give the commissioners authority to sell, and the sale was void. (Page 35.) The jury being the judges of the facts—and having passed upon them—the only remedy was a motion for a new trial.

The Court further charged the jury: "If the commissioners adopted a rule, whether in writing or not, that they would not receive taxes from any one but the owner or person holding a lien upon the property, after the lapse of sixty days from the publication of the assessment, it dispensed with the necessity of a tender of taxes, and the sale of the lot in question would be void." (Page 36.) This charge is assigned as fifth error.

In the case of Bennett *vs.* Hunter, it was held that the right to pay the taxes remained in the owner until the sale; that default in payment of taxes worked no divestiture of title, though it became subject to be vested in the United States, or other purchaser, upon public sale, and that until such sale, either the owner, or some friend or agent in his behalf, had the right to make payment of taxes.

The rule adopted by the commissioners referred to in the charge of the Court denied that right; the commissioners regarded the property forfeited to the United States; and that after sixty days, the only right of the owner was to redeem the property in the same manner as if it had been sold, and the title actually divested under the statute.

In the case of Tacey *vs.* Irwin, this Court decides that such rule adopted by the commissioners effectually denied the right of any person, except the owner in person, to pay the taxes, which was equivalent to saying that a tender by any friend or agent would be refused, "which was wrong, and was a denial of the opportunity to pay accorded to the owner by the act."

The evidence shows that the rule referred to in the charge of the Court, was adopted and acted upon by the commissioners. Reed says: "After sixty days had transpired after

the publication of the first notice, the property was regarded as forfeited, and the parties were allowed to come in and redeem, for sixty days longer." (Page 29.)

Mr. Sammis, another of the commissioners, says: "As commissioner, I talked with the citizens before I left St. Augustine for the North. When about to leave St. Augnstine, on 3d of June, about twenty citizens came to me, and offered to pay their taxes, appearing very anxious and uneasy about the matter. I said to them that I was not prepared to receive the taxes, and told them that the office was to be left in charge of Mr. Dunham, to whom they could pay taxes for sixty days, and after that the property would be forfeited. I think the sixty days had commenced when I spoke to the citizens. Mr. Dunham was instructed to receive the taxes until the lapse of sixty days." (Page 32.)

Witness further stated, "The commissioners did not pass any resolution that no one but the owner could pay taxes. I don't think it was a matter of record. We talked it over, and that was our view of the law. Mr. Dunham understood the view that the commissioners took of the law.

The evidence shows that the construction of the law was agreed upon by the commissioners before they left St. Augustine. The rule, not to receive taxes after expiration of sixty days, except by way of redemption, was adopted, and announced as early as June 3d, by Commissioner Sammis to about twenty citizens, who had already become anxious on the subject, and was also communicated to Dunham, the only person left in the place authorized to receive payment of taxes.

It appears further, from the evidence, that Dunham acted in accordance with the instructions given him.

Amos Corbett testifies, that he was in possession of the property in question until October, 1863, placed in possession by Myers. "Went to pay the taxes on the property; was instructed to pay the taxes by Myers and Weems; Weems went away in June; I went to Dunham to pay the tax on this lot; he refused to receive the taxes, saying, that the title of the property was in Weems, and not his wife, and that I might just as well talk about paying the taxes on Jeff. Davis' property." (Page 32.)